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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

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No. 81.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Plaintiff-in-Error*,

vs.

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 82.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Plaintiff-in-Error*,

vs.

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 586.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Plaintiff-in-Error*,

vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 587.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Plaintiff-in-Error*,

vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 588.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Plaintiff-in-Error*,

vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

Brief for Plaintiff-in-Error.

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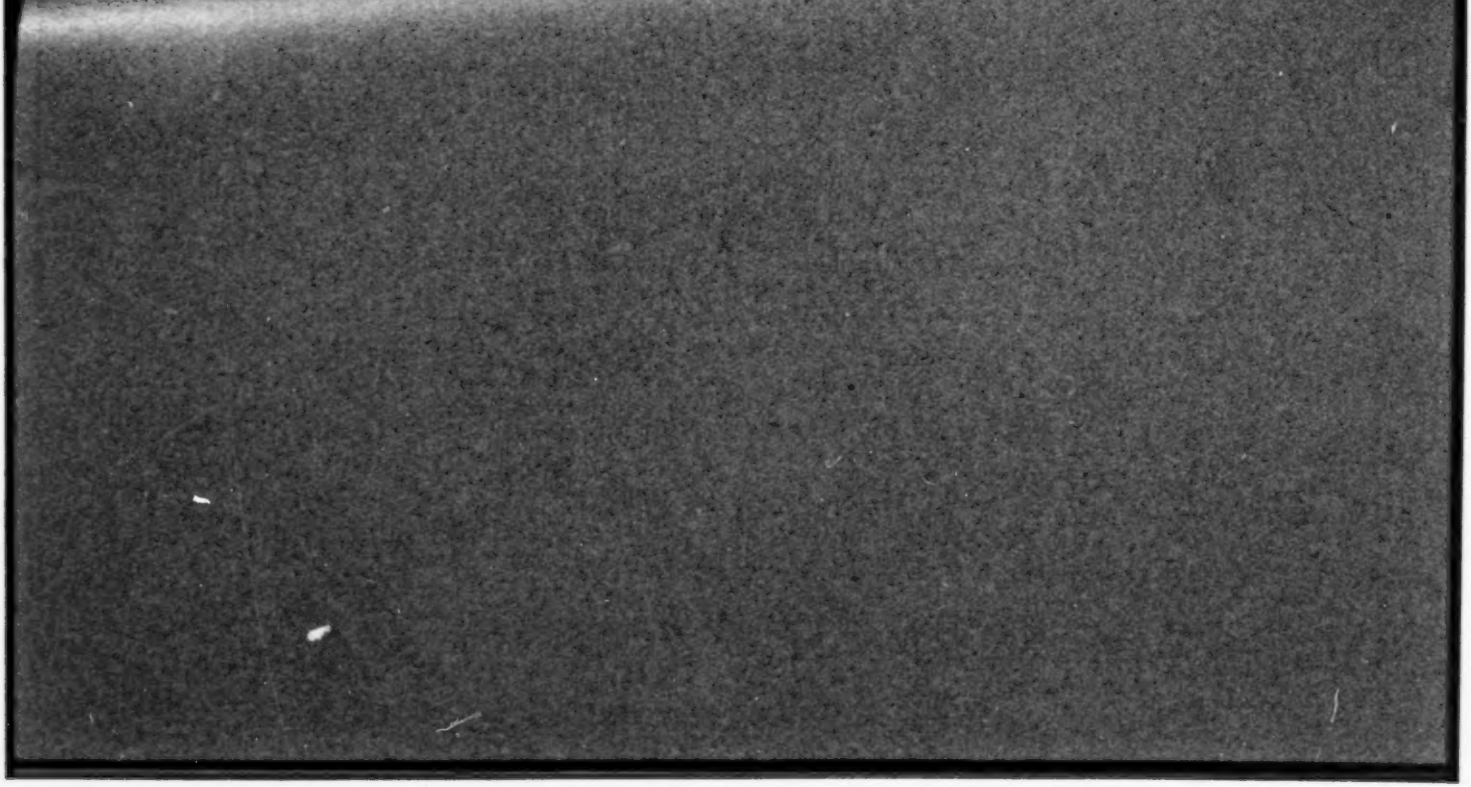

Statement of the Case.

These are proceedings in error, cases Numbers 81 and 82 being writs of error to the Supreme Court of the State of New York, and Numbers 586, 587 and 588 writs of error to the Court of Appeals of the State of New York, to review the judgments of the state courts sustaining franchise taxes imposed against relator, plaintiff in error, under color of the authority of Section 182 of the Tax Law of the State of New York. The respective cases have relation to the said tax for respective tax years ending October 31st, case No. 81 tax of 1900, No. 82 tax of 1901, No. 586 tax of 1902, No. 587 tax of 1903, and No. 588 tax of 1904.

Relator was during the said tax years and is a railroad corporation organized and existing under authority of the laws of the State of New York, owning and possessing a line of railroad extending from the city of New York to the city of Buffalo, and sundry branches, all in the State of New York; and lessee in possession of other lines of railroad wholly within the State of New York, and of still other lines of railroad, some thereof partly within the State of New York and partly within the States of Massachusetts, New Jersey and Pennsylvania, respectively,

and others thereof, respectively, wholly within some one of the said states other than New York.

During all of said tax years relator was and is operating its said owned and leased lines of railroad in the capacity of a common carrier of persons and property between points respectively within each of the respective States of New York, Massachusetts, New Jersey and Pennsylvania, and between points within either of the said states and points respectively in others of the United States, and between points respectively without the State of New York *via* routes some thereof in part within and others thereof wholly without the State of New York.

Also during each of the said tax years the said relator was and is, under a system of agreements and arrangements with other common carrier railroad and other transportation companies for through routing and rating, engaged in the through transportation of persons and property between points upon the said lines of railroad so operated by it, and points in other states and foreign dominions, upon and reached by and over the lines and routes of the said other common carrier railroad and other transportation companies.

The railroad lines thus operated by relator, subject to minor changes from year to year, had a total main line mileage of 3,490.26 miles, of which 2,594.32 miles was within the State of New York, 336.60 miles thereof was within the State of Massachusetts, 24.89 miles thereof was within the State of New Jersey, and 534.45 miles thereof was within the State of Pennsylvania.

Relator used and operated such portion of its rolling stock as was from time to time in its possession, as an entire system in operating upon and over its said entire operated railroad mileage, whereby a large average proportion thereof was at all times in use and operation by it upon its operated lines of railroad in the said respective states other than New York; such employment thereof

being both in transportation between points both within either of such respective states other than New York, and between points within either such state other than New York and points in other states and foreign dominions.

In and about and incident to the use and employment of relator's cars in through transportation of persons and property to and from points on lines of railroad of other common carrier railroad companies situate in other states and foreign dominions, large numbers of relator's cars were continually passing from its possession into the possession of said other railroad companies, and were possessed, used and employed by them, and by still other such companies to whom the said cars were delivered in due course of business, and were by said companies, respectively, used and employed in such other states and foreign dominions, as well in transportation of persons and property between points situate in respective states other than New York, as also between points within those, and points in other respective states, and foreign dominions.

Illustrative of this usual and customary course of transportation business were the movements or transfers from one railroad transportation company to another of a considerable number of individual cars of relator, among others, to wit: car No. 90110, leaving Lockport, N. Y., September 30, 1902, destined to Oklahoma City, performed its said destined service and in due course was returned to relator on November 19, 1902 (No. 586 P. R., 62); car No. 31772, leaving Schenectady, N. Y., March 6, 1902, destination Clearwater, S. C., was returned to relator on July 2, 1902 (*id.*, 62); car No. 56491, leaving Weehawken March 17, 1902, destined to Berlin, Ontario, performed its said service and was in ordinary course returned to relator on April 16, 1902 (*id.*, 63); car No. 41278, delivered by relator to Michigan Central Railroad Company on April 19, destined to Detroit, Mich. (*id.*, 40),

was continuously out of relator's possession for a period of 7 months and 28 days, during which it was transferred 14 times from one railroad company to another (*id.*, 63); car No. 41038, delivered by relator to L. S. & M. S. Ry. Co. on April 28, destination not shown, was continuously out of relator's possession for a period of 4 months and 11 days, during which it was transferred from one railroad company to another 19 times (*id.*, 64); car No. 59578, delivered by relator to L. S. & M. S. Ry. Co. on April 2, destination Chicago (*id.*, 40), was out of relator's possession 7 months and 29 days, during which it was, as aforesaid, transferred 18 times (*id.*, 64); car No. 63158, delivered by relator to L. S. & M. S. Ry. Co. June 12, destination Chicago (*id.*, 40), was out of relator's possession 3 months and 29 days, during which it was transferred 9 times (*id.*, 65); car No. 18236, delivered by relator to Michigan Central Railroad Company March 5, destination Grand Rapids, Mich. (*id.*, 40), was out of relator's possession 9 months and 15 days, during which it was transferred 15 times (*id.*, 65); car No. 63123, delivered by relator to L. S. & M. S. Ry. Co. June 15, destination Cleveland, Ohio (*id.*, 40), was out of relator's possession 6 months and 6 days, during which it was transferred 19 times (*id.*, 66); car No. 63176, delivered by relator to L. S. & M. S. Ry. Co. February 11, destination Edison, Ohio (*id.*, 40), was out of relator's possession 10 months and 7 days, during which period it was transferred 27 times (*id.*, 66): car No. 64431, delivered by relator to L. S. & M. S. Ry. Co. June 27, destination Chicago (*id.*, 40), was out of relator's possession 3 months and 25 days, during which period it was transferred 12 times (*id.*, 67); car No. 61834, delivered by relator to L. S. & M. S. Ry. Co. July 2, destination San Francisco, Cal. (*id.*, 40), was out of relator's possession 5 months and 16 days, during which it was transferred 8 times (*id.*, 67); car No. 14035, delivered by relator to L. S. & M. S. Ry. Co. December

20, 1901, was out of relator's possession 1 year and 14 days, during which it was transferred 18 times (*id.*, 68); car No. 27941, delivered by relator to Michigan Central Railroad Company June 12, 1902, destination Joliet, Ill. (*id.*, 40), was out of relator's possession 5 months and 13 days, during which it was transferred 13 times (*id.*, 69); car No. 90350, from Weehawken, destined to San Francisco, delivered by relator to Michigan Central Railroad Company March 4, 1904, was out of relator's possession until July 31, 1904, during which period it was transferred 18 times (*id.*, 164); car No. 63379, from Weehawken, destination Minneapolis, delivered by relator to Wabash Railroad Company March 14, 1904, returned to relator May 18, 1904, during which period it was transferred 14 times (*id.*, 164); car No. 11645, from Weehawken, destination Victoria, B. C., delivered to Canadian Pacific Railroad Company March 15, 1904, in the hands of L. S. & M. S. Ry. Co., on August 29, 1904, during which period it was transferred 24 times (*id.*, 165); car No. 46260, from Weehawken, destination Medicine Lodge, Kansas, delivered to Wabash Railroad Company March 21, 1904, returned to relator April 5, 1904, during which period it was transferred 8 times (*id.*, 165); car No. 64397, from Weehawken, destination Hamilton, Ontario, delivered by relator to Canadian Pacific Railroad Company March 21, 1904, returned to relator July 18, 1904, during which period it was transferred 21 times (*id.*, 166); car No. 24241, from Weehawken, destination Winnipeg, Manitoba, delivered by relator to Canadian Pacific Railroad Company March 25, 1904, returned to relator April 5, 1904 (*id.*, 166); car No. 64887, from Weehawken, destination Minneapolis, delivered to Canadian Pacific Railroad Company March 26, 1904, returned to relator April 11, 1904 (*id.*, 167); car No. 65224, from Weehawken, destination Duluth, delivered to Canadian

Pacific Railroad Company April 2, 1904, returned to relator April 22, 1904 (*id.*, 167).

Comparison of the movements of these respective cars outside of the State of New York establishes that in the majority of instances the time of absence of the car from relator's possession, and the measure of use thereof by foreign corporations on their railroads, bears no substantial relation to the measure of such operation required for the purpose of carrying to its destination the loading with which the car leaves relator's road and the subsequent return thereof with loading destined to some point upon relator's road or otherwise return of the car.

As is seen, cars destined to points as far distant as San Francisco, Cal., are in some instances returned to relator within a very few days, while in the majority of instances cars destined to points quite a short distance relatively from relator's operated line, are continuously out of its possession for a series of months.

The leased lines of railroad operated by relator outside of this State included various roads in Pennsylvania directly connected with coal mines there situate, and the principal business of such operation thereof was the transportation of coal; in the ordinary course of business coal cars are not, like ordinary merchandise box and freight cars, reloaded at or near the place where previous loading has been delivered, either in course of return to or toward the owning road or otherwise, but are in ordinary course returned empty to the mine tipples to be again reloaded; and a large proportion of the cars of relator used in that service are thus used in carrying coal to and over relator's operated lines and connecting railroads to destination without at all entering the State of New York (*id.*, 42).

The roads so operated by relator outside of the State of New York are maintained and operated by virtue of and under authority of franchises granted by the respective

states in which the said roads respectively are situate, and operated by relator by virtue of and under authority of lease or trackage right to it of such road and franchise and under the terms whereof relator is required to and does pay any and all state taxes imposed upon the said road and franchises and privileges of operation thereof (*id.*, 31).

Stated in as brief detail as may be the record presented in No. 81 is as follows:

Of date, November 30, 1900, relator, plaintiff in error, made report in writing to the State Comptroller for the tax year ending October 31, 1900, as the basis of a franchise tax to be computed upon the amount of its capital stock employed within that state (P. R., 36).

This report showed relator's issued capital stock for the tax year $108,750,000 of the average value per $100 share $129.8125, aggregating $141,171,093.75. That of its total capital or assets 60.37 per centum was employed in the State of New York and 39.63 per centum employed outside of that state. That thus of its said capital stock $65,652,375 of the market value of $85,224,989.30 was employed in New York State, and upon which the tax of one and one-half mills on the dollar would amount to $127,837.48.

The State Comptroller computed and assessed the tax upon capital stock of $106,000,000, to wit, $159,000 (P. R., 7).

Relator made application to the Comptroller for resettlement of the tax (P. R., 16), which, after hearing had thereon (P. R., 16) the Comptroller refused (P. R., 8).

Upon that hearing relator made proof of the amount of its total capital or assets and the portions thereof employed respectively within and outside of the State of New York, the latter including the average amount of equipment employed outside the State, to wit, $15,230.-186.06,

Upon review of that determination in and by the Supreme Court, Appellate Division, that Court found as matter of fact the said

> "item of $15,230,186.06, being such proportion of all of relator's rolling stock as the mileage thereof without the State bears to the entire mileage of said rolling stock" (P. R., 41);

and as matter of law adjudged, *inter alia*, that in the fixing of the amount upon which the tax should be computed that item should be excluded (P. R., 41).

From the order and judgment of that Court both parties appealed to the Court of Appeals (P. R., 46).

The Court of Appeals adjudged that the order of the Appellate Division

> "be and the same hereby is modified as indicated in the opinion of Haight, *J.*, and proceedings remitted to the Comptroller," (P. R., 1), viz:
> "to the end that further evidence may be taken upon that subject in case it should be claimed that some portion of relator's rolling stock was used continuously outside of the State, and if it should be found that such was the fact, the amount thereof should be deducted" (P. R., 49).

Upon that rehearing relator made proof that the value of its total movable equipment, the average amount employed by it outside of New York State, and the car movements of various of its cars while out of its possession (P. R., 84–89), and that these were fairly illustrative of the general character of the movements and use of its cars when in the hands of other railroad companies (P. R., 75), and thus showed how its equipment of the average value of $15,230,186.06 mentioned in the said report (P. R., 82) was continuously employed outside of New York State, and showing the basis of computation thereof, to wit:

> "We receive from other railroads records of the number of miles made by our cars upon other lines, but they don't give us the number of individual cars.

Their reports to us simply show: Your cars made during the month so-and-so upon our line so many miles; that might be ten or it might be fifty cars. We assemble together all these miles made upon other roads and then divide that total between the miles made by cars on other roads in New York State and on other roads out of New York State" (P. R., 80).

The Comptroller refused to further resettle the tax (P. R., 61); and upon review by the Supreme Court, Appellate Division, that determination was affirmed, the grounds of affirmance being stated as follows:

"The original determination of the comptroller imposing the franchise tax under section 182 of the tax law, upon the relator for the year ending October 31, 1900, was reviewed by this court and a readjustment order (People *ex rel.* N. Y. C. & H. R. R.R. Co. *vs.* Knight, 75 App. Div., 169). On that readjustment it was held that the relator was entitled to be credited on the value of its rolling stock with the sum of $15,230,186.06, which was the proportionate value of the average amount of its rolling stock employed outside the State during the year.

"Upon a review of our decision by the court of appeals, that court decided that the relator could not be credited with this average amount of its rolling stock employed outside the State during the year, but only such of it as was used exclusively and continuously outside, and remitted the proceedings to the comptroller for further hearing upon that subject (People *ex rel.* N. Y. C. & H. R. R.R. Co. *vs.* Knight, 173 N. Y., 255).

"The relator failed to establish upon such hearing that it employed any of its rolling stock in this manner, and the comptroller has properly found that none was so employed, and it remains only for us to confirm his determination" (P. R., 92).

Upon appeal to the Court of Appeals that court upon hearing adjudged:

"Orders affirmed, with costs, on opinion in People *ex rel.* N. Y. C. & H. R.R. Co. *vs.* Knight (173 N. Y., 255)" (P. R., 95).

The ground thus announced as the basis of the decision is stated in the opinion mentioned, to wit:

> "I concur in the conclusions reached by O'Brien, *J.*, except as to that part thereof which holds that the item of $15,230,186.06 is not taxable. The court below found that this item represented the rolling stock employed outside of the State, it 'being such proportion of all of relator's rolling stock as the mileage thereof without the State bears to the entire mileage of said rolling stock.' As I understand this finding it is to the effect that the rolling stock of the relator is used in this State and outside of the State; that is, cars are loaded at some point in the State, as, for instance, in the city of New York, and run over the relator's road to some other point, say the city of Buffalo. They then are transferred on to other roads and are run to points outside of the State where they are unloaded and then reloaded and returned to this State. The entire mileage includes that traveled in this State as well as that out of the State; this, with the distance traveled outside of the State and the total value of the stock, furnishes the proportion upon which the computation is made.
>
> The question is as to whether this stock is taxable under the statute. The relator is a domestic corporation. It owns the rolling stock. It is used upon its lines of railroad in this State. True, the cars are transferred on to other roads and are run outside of the State for the purpose of facilitating the transportation of persons and freight without change of cars or of breaking bulk, but the use of the cars outside of the State is but temporary, for they are returned as soon as reloaded and are again used in the transportation of persons and property within this State. It seems to me, therefore, that, under a fair and reasonable construction of the statute, this item should have been included as capital employed within this State" (P. R., 49).

In thus deciding the Court held and adjudged:

> "That the statute (1) does not offend against the commerce clause (article 1 of section 8) of the Fed-

eral Constitution, (2) does not contravene the provisions of article 1, section 10, thereof forbidding impairment of the obligations of contracts, (3) does not offend against the provision of the fourteenth amendment thereof forbidding the State to deprive any person of property without due process of law" (P. R., 94).

In case No. 82 the hearing before the State Comptroller for resettlement of the tax of 1901 was had at the same time as the second hearing before that officer regarding the tax of 1900, and the record is in essential respects, except as to amounts, the same as that in case No. 81.

The determination of the Comptroller was affirmed in both cases by the Supreme Court, Appellate Division, November 10, 1903 (No. 81 P. R., 90; No. 82 P. R., 46); and by the Court of Appeals, February 23, 1904, "On opinion in *People ex rel. N. Y. C. & H. R. R.R. Co.* vs. *Knight* (173 N. Y., 255)," (No. 81 P. R , 93–95; No. 82 P. R., 48–50), and the same grounds of constitutional objection ruled upon in each (No. 81 P. R., 94; No. 82 P. R., 49).

The records in cases 586, 587 and 588, respectively, show that the constitutional grounds of objection to the tax were presented in and by the application to the State Comptroller for resettlement of the tax, and in the petition for the writ of certiorari to review the Comptroller's determination of and upon the said application, to wit:

> "That if and in so far as the enactments under color of which this tax is imposed purport to authorize taxation for or upon or in respect of the aforesaid use or exercise of franchises foreign to the State of New York, or computed upon the basis of capital thus in manner aforesaid used and employed within the territorial jurisdiction of other states, territories or foreign dominions, in the use and exercise of, and under the authority of franchises granted by them or by the United States to corporations created by them, respectively, the said enactments are beyond the

power and prerogative of the State of New York to prescribe and enforce and are violative of and contravene the constitution, laws and treaties of the United States in that they deprive petitioner of the equal protection of the laws; also, in that they constitute the taking of property without due process of law; also, in that they constitute a regulation of, interference with and a burden upon inter-state commerce and foreign commerce; also, in that they impugn the dignity and sovereignty of the United States and of sister states and of foreign dominions; also, in that they impair the obligations of the contracts arising upon and inhering in the grant to and acceptance by the corporations the lessors and licensors of said petitioner of the franchises by it as lessee and licensee used and exercised in respective states, territories and dominions other than and foreign to the State of New York; also, in that they impair the obligations of the contracts of lease of trackage right and license respectively, under and by virtue of which petitioner uses and exercises in respective states and territories other than the State of New York and in foreign dominions the franchises granted by them respectively to the lessors and licensors of said petitioner; also, in that they impair the obligations of the contracts, express and implied, under which petitioner is required to and does order, direct and permit or order, direct or permit its movable equipment to pass to and remain in the custody and subject to the control of other corporations and be by them controlled and used in and about the transportation of persons and property upon their roads in other states and territories and foreign dominions under authority of and in the use and exercise of franchises granted by them respectively; also, in that the said enactments, and the judgments of the officers and tribunals in and of the State of New York sustaining and administering them, in and by imposing and exacting payment to the State of New York of a franchise tax computed upon the basis of the capital of said petitioner employed within the territorial jurisdiction of other re-

spective States, in the use and exercise of franchises granted by them, respectively, deny and refuse to give 'to the public acts' of said other respective States, by and under which the said franchises are granted, and the use and exercise thereof authorized and regulated, the 'full faith and credit' force and effect which the said public acts are entitled to have, and do have, in the respective States whose acts they are," etc. (P. R., 8, 9; 17, 18).

The evidence included statutes and judicial decisions showing the taxation which the franchises used by relator and its use thereof were subject unto in the States of Massachusetts, New Jersey and Pennsylvania respectively (No. 586 P. R., 31, 42), as also the general system and business practice under and in pursuance of which the large average portion of relator's cars, consisting, however, of constantly changing individual cars, were continuously and permanently possessed and used by other common carrier railroad companies outside of the State of New York, not only in the part performance of transportation beginning or ending upon relator's operated lines of railroad but also and largely in acts of transportation having no relation to relator's transportation business. (No. 586 P. R., 62–69, 164–167).

The values of the average amounts of relator's equipment shown to have been continuously employed outside of the State of New York during the respective tax years were:

1902, by relator, $4,780,862.98, and by foreign corporations, $11,865,528.08 (586 P. R., 61); 1903, by relator, $3,148,216.64, and by foreign corporations, $16,254,384.74 (587 P. R., 46); 1904, by relator, $3,513,619.12, and by foreign corporations, $16,447,169.96 (588 P. R., 45).

In and by the resettlements which the Comptroller awarded and made, after and consequent upon the hearing upon relator's said applications, he deducted from

the tax, and credited to relator, upon the tax of 1902 the sum of $4,934.47 (586 P. R., 6), being exactly the aggregate of the sums of $1,931.58 and $3,002.89 claimed by relator (*id.*, 14, 16, 61), in respect of the matters named, other than outside employed equipment.

Upon the tax of 1903 relator claimed credits on matters other than outside employed equipment $1,189.52 (587 P. R., 14), and $622.72 (*id.*, 16), aggregating $1,812.24 and $13,984.41 on outside employed equipment (*id.*, 16). The Comptroller awarded a credit of $1,932.17 (*id.*, 6), being slightly in excess of the credit claimed by relator as to matters other than outside employed equipment.

Upon the tax of 1904 the relator claimed credit solely in respect of outside equipment $12, 649.50 (588 P. R., 15-18), and the Comptroller awarded it a credit of $571.57 (*id.*, 6).

The tax, in respect of capital stock represented by the average amounts of outside equipment, which the Comptroller refused resettlement and deduction of, thus stands, for 1902, $13,909.28 (586 P. R., 9), for 1903, $13,864.48 (587 P. R., 9), and for 1904, $12,077.93 (588 P. R., 9).

The three cases were heard and determined together, and without opinion, in the Supreme Court, Appellate Division (P. R., 167-169); and upon appeal in the Court of Appeals (P. R., 171-173).

In and by such its determination the Court of Appeals held and adjudged, to wit :

> "The relator having contended herein that the statute, if it purport to authorize the said tax, and the authority exercised under the Statute in and by the imposition and exaction of the said tax are and each thereof is violative of the Constitution of the United States in the several particulars following; the court hold and adjudge that the statute under and in pursuance of which the tax herein complained

of is imposed and exacted does not, and the authority exercised under this Statute in and by the imposition and exaction of the said tax does not, (1) offend against the commerce clause, Article 1, Section 8, of the Constitution of the United States; (2) nor contravene the provisions of Article 1, Section 10, thereof forbidding impairment of the obligations of contracts; (3) nor offend against Article 4, Section 1, thereof requiring that full faith and credit shall be given in each State to the public acts of every other State; (4) nor offend against the provisions of the fourteenth amendment thereof forbidding the State to deprive any person of property without due process of law, and forbidding the State to deny to any person within its jurisdiction the equal protection of the laws." (P. R., 170-172.)

Section 182 of the Tax Law of the State of New York as in force in the tax year ending October 31, 1900, is as follows:

"FRANCHISE TAX ON CORPORATIONS.—Every corporation, joint stock company or association incorporated, organized or formed under, by or pursuant to law in this state, shall pay to the state treasurer annually, an annual tax to be computed upon the basis of the amount of its capital stock employed within this state and upon each dollar of such amount, at the rate of one-quarter of a mill for each on[illegible]er centum of dividends made and declared upon its [illegible]ital stock during each year ending with the thirty-first day of October, if the dividends amount to six or more than six per centum upon the par value of such capital stock. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation. If no dividend is made or declared, the tax shall be at the rate of one and one-half mills upon each dollar of the appraised capital employed within this state. If such corporation, joint stock com-

pany or association shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six, or more than six percentum, upon the par value thereof, has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto a tax shall be charged at the rate of one and one-half mills upon every dollar of the valuation made in accordance with the provisions of this act of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum. * * * Every corporation, joint stock company or association organized, incorporated or formed under the laws of any other state or country, shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital employed by it within this state."

The section was amended by Chapter 558, Laws of 1901, but the amendment effected no change pertinent to the taxation of corporations such as relator.

Established judicial construction of this statute is to the effect that it imposes a per annum tax, computable upon the average amount of capital stock of domestic corporations, and upon the average amount of capital of foreign corporations, respectively, employed within this state during the tax year.

Relator is also subjected to a further franchise tax of five-tenths of one per centum upon its gross earnings within the State.

Tax Law, Sec. 184. See Appendix, p. 22.

PROPERTY TAXATION.

The real estate, except special franchises, of relator and other like corporations, is assessed for taxation by the same local assessing officers and subject to the same rules of valuation as the real estate of individuals.

Tax Law, Secs. 2, 3, 11, 21. See Appendix, pp. 13–17.

In so far as the railroad occupies or uses streets, highways, public places or public grounds, the privilege of such occupancy and use is denominated a special franchise, and the privilege and easement of such occupancy and use, together with all tangible property there maintained by or for it, are assessed for taxation by the state board of tax commissioners, subject to the like rules of valuation governing assessment of real property for taxation.

Tax Law, Secs. 2, 42. See Appendix, pp. 13–15, 18–20.

Tax for State, County, Town, School and Municipal purposes is imposed upon such valuations the same as upon the real estate of individuals.

Tax Law, Sec. 55. See Appendix, pp. 20–21.

The capital stock and personal property, including rolling stock of relator and other like corporations, is, like that of other corporations, subject to local assessment for taxation in the taxing district where its principal office is situate, and subject to taxation for all other than state purposes.

Tax Law, Secs. 12, 27, 31, 202. See Appendix, pp. 16, 17–18, 25–26.

The tax upon and for the right of corporate existence and capacity is assessed and imposed once for all, and required to be paid prior to the exercise of any corporate power in and about the location, building, maintenance or operation of any railroad.

Tax Law, Sec. 180. See Appendix, pp. 21–22.

The lease of a railroad carries with it the right of exercise of, and subject unto all limitations and restrictions upon, the franchises pertaining to the railroad so leased.

Railroad Law, Sec. 78. See Appendix, pp. 1–2.

The State tax on each dollar of valuation for the respective years for which the franchise tax here in question was imposed was as follows:

1900, Two and forty-nine one-hundredths mills (Chaps. 208 and 571 Laws of 1899); 1901, One and ninety-six one-hundredths mills (Chap. 421 Laws of 1900); 1902, One and twenty one-hundredths mills (Chap. 643 Laws of 1901); 1903, Thirteen one-hundredths of a mill (Chap. 615 Laws of 1902); 1904, Thirteen one-hundredths of a mill (Chap. 641 Laws of 1903). See Appendix, pp. 26–30.

The franchise tax imposed, computed upon relator's capital stock employed within this State, under section 182, and upon its taxable gross earnings under section 184, of the Tax Law, aggregate many times what would be the amount of the State tax, at the respective rates above mentioned, computed upon the amount of its taxable personal property, from which it is exempted by section 202 of the Tax Law.

Specification of Errors.

The errors relied upon for review and reversal of the judgments complained of are the following:

I.—In that the provisions of section 182 of the Tax Law of the State of New York, and the authority exercised thereunder by the Comptroller of the State of New York, were held valid in and for franchise taxation upon the capital of the said relator invested in the average number of its cars which were used by other common carrier railroad corporations outside of the State of New York in the

through carriage of persons and property from the State of New York, to other states, and vice versa, and in transportation of persons and property between points in respective states other than and over routes wholly outside of the State of New York, and that such franchise tax did not offend against the commerce clause, Article 1, Section 8 of the Constitution of the United States.

II.—In holding and deciding the said statute valid authority for franchise taxation upon the basis of the capital of the said relator invested inthe average number of its cars used successively and interchangeably by other common carrier railroad corporations outside of the State of New York under authority of and in the exercise of franchises granted to them respectively by respective states other than New York, and that the franchise tax thus computed and imposed did not impair the obligations of the contracts pertaining to the grant, acceptance and use of the respective franchises whereunder the said cars of relator were thus operated and used outside of the State of New York, and hence was not repugnant to Article 1, Section 10 of the Constitution of the United States.

III.—In holding and deciding the said statute valid authority for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its cars used upon railroads in respective states other than New York State in the through carrying of persons and property from points in New York, Massachusetts, New Jersey or Pennsylvania, respectively, to points outside of such respective state, and vice versa, and between points foreign to said several states, all in the exercise of and under the authority of franchises granted by the respective states wherein the said operations were so carried on and that such franchise tax

did not impair the obligations of the contracts pertaining to such use of relator's cars by other corporations, and hence was not repugnant to Article 1, Section 10 of the Constitution of the United States.

IV.—In holding and deciding the said statute valid authority for and the exercise thereunder of said authority the valid imposition of franchise taxation by the State of New York upon the basis of the capital of relator invested in the average number of its cars which were delivered by relator to transportation corporations foreign to the State of New York, and used by them wholly within states other than New York, under authority of, and in the exercise of franchises granted by such other states, respectively, to corporations created by them, and that the said statute and the said tax imposed under its authority, did not operate to deprive relator of its property without due process of law, and did not deprive relator of the equal protection of the laws and hence did not contravene the provisions of the fourteenth amendment to the Constitution of the United States.

V.—In holding and deciding that franchise taxation prescribed by and imposed by the said Comptroller of the State of New York under the supposed authority of said statute, upon the basis of relator's capital invested in the average number of its cars by it used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, in the exercise of franchises granted by those States, respectively, to corporations created thereby and domiciled therein, and by the latter leased to the said relator, all subject unto the regulation of and under the authority and protection of the public acts of such respective State, did not not offend against the provisions of the commerce clause, Article 1, Section 8 of the Constitution of the United States; and did not deny or refuse full

faith and credit to the public acts of such other state and therein did not contravene Article 4, Section 1 of the Constitution of the United States.

VI.—In holding and deciding the said statute valid authority of and for franchise taxation in and by the State of New York upon the basis of the capital of relator invested in the average number of its cars used by it in the States of Massachusetts, New Jersey and Pennsylvania in the exercise of franchises granted by those states, respectively, and leased to the said relator, and exercised by it in the carrying of commerce between points respectively within, and between points within and points without those respective states, and that therein and thereby the said statute did not impose burden upon or regulation of interstate and foreign commerce and did not impair the obligations of contracts pertaining to interstate and foreign commerce, and hence did not offend against the provisions of either Article 1, Section 8, or Article 1, Section 10 of the Constitution of the United States.

VII.—In holding and deciding that franchise taxation imposed by the said Comptroller of the State of New York under the supposed authority of said statute, upon the basis of the capital of said relator invested in the average number of its cars by it operated and used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, in the exercise of franchise granted by those States, respectively, to corporations created thereby and domiciled therein, and by them leased to relator and by it exercised in commerce local to said respective States, as also in commerce between those respective States and other States, did not impair the obligations of the contracts pertaining to the grant, acceptance and use of the franchises granted by the said respective States, and hence did not therein offend against the provisions of

Article 1, Section 10 of the Constitution of the United States.

VIII.—In holding and deciding the said statute valid authority for franchise taxation upon the basis of the capital of the said relator invested in the average number of its cars used wholly outside of the State of New York, in the operation of railroads situate in other States, owned by corporations created by and domiciled within such other respective States, and leased to and operated by the said relator under authority of the franchises of its respective lessors, granted to them by the said States, respectively, and that such franchise tax did not impair the obligations of the said contracts of lease, and hence was not therein repugnant to Article 1, Section 10 of the Constitution of the United States.

IX.—In holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation upon the basis of the capital of the said relator invested in the average number of its cars used by relator in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon lines of railroad situate in and owned by corporations chartered by said respective states and leased by such corporations to and operated by the said relator, in the carrying of state and interstate commerce, and that such franchise tax did not deprive relator of its property without due process of law, and did not deny to relator the equal protection of the laws, and hence did not therein contravene the fourteenth amendment of the Constitution of the United States.

X.—In holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the Comptroller of the State of New York exercised thereunder to constitute valid imposition of the

said franchise tax imposed and computed upon the basis of the capital of the said relator invested in the average number of its cars, which, having passed out of the State of New York and out of the possession of the said relator, were operated and used by railroad corporations created by other states upon their railroads there situate, in common carrier transportation local to said respective states and between those and other states, and that such franchise tax thus computed and imposed did not constitute a burden upon or regulation of commerce among the several states, and did not impair the obligations of the contracts under which the said relator transferred and surrendered, and the said respective foreign corporations acquired and used the said cars, and did not impair the obligations of the contracts, inhering in, arising upon the grant, acceptance and use in of the franchises granted by them, respectively, and did not refuse full faith and credit to the public acts thereof, or otherwise offend against either Article 1, Section 8, or Article 1, Section 10, Article 4, Section 1, or the fourteenth amendment of the Constitution of the United States.

XI.—In holding and deciding the said statute of the State of New York to be valid authority for, and the said authority exercised thereunder to constitute valid imposition of the said franchise tax computed and imposed upon the basis of the capital of the said relator invested in the average number of its cars operated and used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, and that such franchise tax thus computed and imposed did not constitute a burden upon or regulation of commerce among the several states or foreign commerce, or commerce within and domestic to such respective state, and did not impair the obligations of the contracts, arising upon the grant, acceptance and use of the franchises granted by them respectively, or of the

contracts whereby and whereunder relator thus operated in the said respective states under authority of said franchises, and did not refuse full faith and credit to the public acts of such other respective state, and hence that the said franchise tax thus computed and imposed did not contravene either Article 1, Section 8, or Article 1, Section 10, Article 4, Section 1, or the fourteenth amendment of the Constitution of the United States.

XII.—In so holding and deciding as therein and thereby to uphold and sustain the validity of the said statutory provisions and of the authority exercised thereunder in the computation and imposition of the said franchise tax as not constituting a burden upon or regulation of commerce domestic to states other than New York, as not constituting a burden upon or regulation of commerce among the several states or with foreign countries, as not impairing the obligations of contracts pertaining to commerce domestic to states other than New York, as not impairing the obligations of contracts pertaining to commerce among the several states and with foreign countries, as not impairing the obligations of contracts pertaining to the grant and acceptance and lease of franchises by and the exercise and use thereof within states other than New York, as not denying full faith and credit to the public acts of such other state, and as not depriving the said relator of its property without due process of law, and as not depriving relator of the equal protection of the laws, and hence denying to the said relator the relief, order and decree herein prayed for, and in rendering judgment against them for costs and disbursements in the said cause and proceeding.

INTRODUCTORY STATEMENT.

Twenty years of franchise taxation to and until the adjudications here presented for review.

Chapter 542 of the Laws of 1880, as originally enacted, and as amended by Chapter 361 of the Laws of 1881, imposed a specific tax as follows:

a. If the dividend or dividends made or declared amount to six or more than six per centum upon the par value of its capital stock, then the tax is to be at the rate of one-quarter mill upon the capital stock for each one percentum of dividend.

b. If no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of a valuation of the said capital stock made in accordance with this act.

See Appendix, pp. 2–10.

Without specifically so declaring, the enactment assumed that jurisdiction to impose this specific tax inured to the State as against domestic corporations by reason of their creation by and domicil within the State, and as against foreign corporations, by reason of their doing business within the State.

As to domestic corporations, the fact of liability to the tax, or the measure of such liability, did not depend upon the fact of their using or employing any franchise or doing any business either within the State or elsewhere, or upon the employment of capital, or the amount of capital employed, within the State or elsewhere.

Foreign corporations doing business and employing

capital within the State were subject to the like specific tax upon their entire capital stock, without reference either to the character of franchise used or exercised within this State or to the amount of capital employed within this State.

The right of apportionment of the tax in such wise as to restrict the basis of computation thereof to the amount of the capital stock employed within this State was contended for and denied.

As to domestic corporations in

People *vs.* Home Ins. Co., 92 N. Y., 328.

People *vs.* Gold & Stock Tel. Co., 98 N. Y., 67, 73, 76, 77.

As to foreign corporations in

People *vs.* Equitable Trust Co., 96 N. Y., 387, 396–7.

People *vs.* Horn Siver Mining Co., 105 N. Y., 76, 84–5, 8.

The tax imposed was distinctively a tax upon the possession by the corporation of its corporate franchise, as distinguished from a tax upon the exercise of its franchise.

The tax had not in any case any reference to the fact, locality or character of employment of the capital, or to the fact or locality of transaction of, or character of the corporate business; or to the fact or amount of either gross or net earnings, except incidentally, in that presumably the fact and amount of dividends would be founded upon the fact and amount of net earnings.

The character of the tax was as defined in *People* vs. *Home Ins. Co.* (92 N. Y., 328; 134 U. S., 594), in which Ruger, *Ch. J.*, writing for the Court of Appeals, at page 338 said:

> "It was also undisputed that a State, in the exercise of its legislative power, has the right to impose

> taxes upon the business privileges and franchises of a corporation organized under its laws and from which alone it derives its corporate existence and secures protection in the prosecution of its business. In other words, it is admitted that among the legitimate subjects of State taxation is not only the property of individuals and corporations, but in case of corporations the very right of exercising the privileges granted to them by the State."

And Mr. Justice Field, writing for the Supreme Court (134 U. S., p. 599), said:

> "By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise."

Subsequently, in 1885, having noted that the tax thus imposed operated unjustly, in that the burden thereby laid upon the corporations subject thereunto was not graded with reference to their measure of use of the State's privilege and grant, the legislature not only provided that for the then future "the amount of capital stock which shall be the basis for tax * * * shall be the amount of capital stock employed within this State," but, in order to measureably rectify the injustice of the meantime imposition of the tax, upon the thereunto prescribed basis thereof, authorized and directed the Comptroller, upon application therefor, "to make, settle and adjust all accounts against such corporation * * * for all taxes and penalties arising under the third section of this Act, since the twelfth day of May, A. D. eighteen hundred and eighty-two, by taking as a basis for taxation the capital employed within this State."

See Appendix, pp. 10–13.

As was stated by Earl, *J.*, writing for the Court in *People* vs. *Horn Silver Mining Co.* (105 N. Y., 76, 87):

> "Then, for the first time, the basis for computing the tax was actually fixed by law at the amount of capital stock employed within the State."

And regarding the reasons upon which the legislature substituted this provision in place of one imposing the tax upon the entire capital wheresoever employed, that learned Judge further said (*id.*, 88):

> "The injustice of such a basis of taxation has finally been recognized by the legislature, * * * by the fourteenth section of the act of 1885 the comptroller was authorized and directed upon application to him of any corporation, to make, settle and adjust all accounts against such corporation, joint stock company or association, for all taxes and penalties arising under the third section of the act of 1881, since the 12th day of May, 1882, by taking as a basis for taxation the capital employed within the State by such corporation, association or joint stock company."

In the case of *People* vs. *Campbell* (88 Hun, 544), Putnam, *J.*, writing for the Supreme Court, General Term, Third Department (*Id.*, p. 546), states the facts presented, and conclusion announced, as follows:

> "The New York Central and Hudson River Railroad Company, for the years 1885, 1886, 1887, 1888, 1889, 1890 and 1891, made the annual report required by chapter 542, Laws of 1880, and the several acts amendatory and supplementary thereto, and paid the tax required by said statute on its franchise or business. It will be seen by an examination of its reports contained in the case, on which the annual franchise tax was computed, that it failed to state in either the amount of its capital stock employed within the State, as required by section 11 of chapter 542 of the Laws of 1880 (added by chapter 151, Laws of 1882), as amended by chapter 501, Laws of 1885.

The Comptroller, therefore, assessed the corporation for each year above mentioned upon its full capital stock, and the tax by him assessed was duly paid.

On or about November 29, 1893, in pursuance of the provisions of section 19 of chapter 542 of the Laws of 1880 (added by chapter 463 of the Laws of 1889), the said corporation applied to the Comptroller for a revision or readjustment of said franchise tax so assessed for each of the years above mentioned."

(*Id.*, p. 549):

"The statement from the records of the New York Central and Hudson River Railroad Company which the Comptroller received in evidence and which we think he had, in his discretion, a right to regard, as to the amount of the capital stock of the company employed out of the State during the years in question, showed that during each of said years a large number of freight cars were permanently occupied out of the State, and that the company also had a portion of its capital stock invested in the stock of foreign corporations and also in corporate bonds.

It does not require a discussion or citation of authorities to show that such part of the capital stock of the railroad company as was invested in freight cars permanently engaged out of the State was not subject to the franchise tax under the provisions of Chapter 542, Laws of 1880, and the acts amendatory and supplementary thereto (*Pullman's Palace Car Co.* vs. *Pennsylvania*, 141 U. S., 18; *Commonwealth* vs. *Del., L. & W. R.R. Co.*, 145 Penn. St., 96)."

(*Id.*, p. 550):

"We, therefore, think that the Comptroller was justified in making the revision he did of the tax assessed against the railroad company as far as it was assessed on that portion of the capital stock of the corporation invested in freight cars permanently engaged out of the State and in the stock of foreign corporations."

Car mileage was the basis of division between values, respectively, included in or excluded from the basis of

taxation, in each of the cases cited as authority for the conclusion announced.

(No. 586, P. R. 129, 137.)

The same rule of interpretation is to be applied to the language employed in a judicial announcement as to that employed in any other documentary or conventional expression, in that the words are to be viewed in the light of common knowledge which every one is presumed to possess concerning the subject-matter about which the words are spoken. The common course of railroad business as transacted at that time and for several decades preceding had been and was that shipments in car-load lots were carried, from point of shipment on one railroad to point of destination upon another railroad, by movement of the loaded car over whatever railroads or parts of railroads constituted and made up the route of travel from shipping point to destination. It was primarily consequent upon this method and course of business that freight cars of the owning company passed beyond its lines of road and beyond State lines to and upon and were thereupon used and employed upon the railroads of other companies, as well in the completion of the shipment thus effected, as also in the initiation and forwarding of other shipments to or toward the road of the company owning the car, and also meantime other use of the car by other railroad companies into whose hands it might adventitiously come. This method or course of business was so commonly known as perforce to impute to the Court in the use of the words "permanently engaged out of the State," the meaning not that specific individual cars were permanently out of the State, but that an average number thereof of the value found were thus "permanently engaged out of the State."

This legal view was accepted and acted upon by taxing officers, practically without question before the courts re-

garding its accuracy, during the ensuing ten years, and until the rule to the contrary was adjudged in the case at bar.

In People ex rel. Lackawanna Transportation Company vs. *Knight*, 75 App. Div., 164, applying the same rule to taxation of capital stock represented by vessels sailing upon the Great Lakes, Chase, Judge, writing for the Court (*Id.*, 167), says:

> "We do not see any distinction in principle between a case where property is employed continuously without the State and a case where property is in good faith employed without the State for a distinct part of the time or for a distinct portion of its mileage."

Again, in this case (No. 81 P.R., 44), the same Court, by the same Judge, says:

> "The balance of the assets consists of $15,230,186.06 for rolling stock, being such proportion of all relator's rolling stock as the mileage thereof without the State bears to the entire mileage of all such rolling stock; $100,000 for coal and supplies without the State; $115,089,533.01 for stock owned by the relator in foreign corporations, and $2,311,686 for that portion of the capital stock owned by the relator in a domestic corporation, which corresponds with the proportion of the assets of such domestic corporation used without the State.
>
> Under the decision in *People ex rel. Lackawanna Transportation Company* vs. *Knight* (75 App. Div., 164), the rolling stock without the State and the said coal and supplies are not capital employed within this State,"

and on review in the Court of Appeals (*id.*, p. 51), O'Brien, Judge, says:

> "The court below found that a certain portion of the relator's rolling stock, that is to say, its cars, both freight and passenger, was employed outside of the state, the proportion being estimated on the

mileage or wheelage basis at $15,230,186.06. The court excluded this item from the calculation on the authority of *People ex rel. Lackawanna Transptn. Co.* vs. *Knight* (75 App. Div., 164). It was there held that the term 'employed within state,' used in section 182, did not mean simply the legal *situs* of the property, and this principle was decided in other cases. (*People ex rel. Chicago Junction, etc., Co.* vs. *Roberts*, 154 N. Y., 1; *People ex rel. Washington Mills Co.* vs. *Roberts*, 8 App. Div., 201; affirmed on opinion below, 151 N. Y., 619.) It is obvious that since the relator is a great interstate railroad traversing the continent that a large proportion, or at least some, of its rolling stock must be always employed outside of the state. It may be that the *situs* of all the relator's property is in the state of its creation, but, as already remarked, the question is not where the *situs* is, but where the property is employed. It may be that various states through which the relator's railroad is operated impose taxes upon such part of its property as upon the basis adopted here is found to be employed in these states respectively, so we think that the learned court below was correct in excluding this item from the estimate of the relator's property employed within this state."

The majority of the court, however, concurred in the view announced by Haight, Judge, as set forth in No. 81, P. R. 49, and quoted at page 10 of this brief.

It is thus seen that the moving cause for the presentation of this question at this time is not by way of effort of the relator to overturn a twenty years' practical construction, and a twelve years' recognized and followed judicial construction, of the statute, as a means of escape from taxation sustained by such construction, but, on the contrary, its effort is to have judicial recognition of the accuracy of that practical and judicial construction which stood for so many years practically unchallenged.

BRIEF OF THE ARGUMENT.

I.

The subject-matter taxed, as herein complained of, is the use and exercise of the franchise, privilege and business of transportation of persons and commodities.

a. Ownership or possession of the corporate franchise to be or to do, do not subject the owner or possessor to the tax.

b. The tax is not imposed upon the franchise *per se* but upon the use thereof.

c. Exercise of the franchise is the foundation for imposition of the tax, and the average amount of capital stock employed is the basis of computation of the tax.

d. The use and exercise of the franchise, privilege or business of transportation thus taxed is that of carrying on commerce either intrastate, interstate or foreign.

II.

It is necessary to the power of taxation upon the use and exercise of a franchise, privilege or business:

1. That such use and exercise thereof be carried on within the territorial domain of the taxing sovereignty; and

2. That the franchise, privilege or business so there used and exercised be such as is within the organic prerogative of that sovereignty to tax the use of.

a. Transportation between respective points one thereof within and the other without, or *via* routes in part within and in part without, a respective state, is interstate or foreign commerce.

b. Refusal of observance of the rule of average for taxation on commerce employment, is discrimination against such commerce.

III.

Taxation of or upon the exercise of the privilege of commerce conducted in another state or computed upon the capital there so employed, whether such commerce be inter-state, foreign, or intra-state, transcends the jurisdiction of the taxing state, and thus takes property without due process of law, and denies full faith and credit to the public acts of such other state.

a. It is requisite to due process of law that the tribunal have jurisdiction of the subject matter of such process.

b. The State cannot by conferment of corporate charter powers to transact business (1) outside of its territorial domain or (2) of character outside the sphere of its governance draw to itself the power of taxation upon such exercise of the charter powers conferred by it.

c. The situs of exercise of the franchise pertaining to transportation upon and over any railroad is the situs of the railroad and of the franchise relating there .

d. Car movements or the thereby exercise of franchise cannot have an imputed situs

e. Taxation of exercise of franchise to do can only be imposed by the sovereignty in whose domain the work is done.

f. Local commerce is subject to local tax by the State wherein it is conducted.

g. Determination as to what tax the exercise of the occupation, privilege or business of intra-state commerce may be subject unto involves (1) giving full faith and credit to the public acts of the State whose local commerce it is, and (2) acceptance thereof as thus accredited as the sole basis of such determination.

h. The effect of the statute (Tax Law, Sec. 182), as adjudged by the New York courts, is to tax the corporate use and exercise in other States of the occupation, privilege and business of the local commerce of those States.

ARGUMENT.

I.

The subject matter taxed, as herein complained of, is the use and exercise of the franchise, privilege and business of transportation of persons and commodities.

In *People ex rel. N. Y. C. & H. R. R. R. Co.* vs. *Feitner*, 75 App. Div., 527; affd. without opinion, 174 N. Y., 532, the real estate of the Spuyten Duyvil & Port Morris Railroad Company had been assessed for taxation at $1,121,600. It possessed no personal property, but defendant Feitner and others, Commissioners of Taxes and assessments of the City of New York, assuming to value the property of the company for purposes of taxation of its capital stock and supposed surplus, and for that purpose, determined the value of the company's fixed property to be the sum of $1,483,500, and deducting from this the $1,121,600, assessed value of real estate, fixed the value of the capital stock and surplus liable to taxation for the year 1901 at $361,900.

The ground upon which this assessment was based is stated in the opinion of McLaughlin, *J.*, (75 App. Div. 529) by quotation from the Commissioners' return to the writ of certiorari, which is in part as follows :

> "This railroad was so situated as to necessitate a different method of valuation from that adopted in the case of an ordinary steam railroad only partly within the tax district. The whole of said railroad was within the tax district and within the jurisdiction of the defendants for purposes of taxation. It was used not for the ordinary purposes of a steam railroad, but to connect two sections of the lines of the New York Central & Hudson River Railroad Company's railroad and so enable that company to

> run its trains into the Borough of Manhattan in the City of New York. By its situation and construction, it was peculiarly adapted to the uses to which it was put and its use was essential to the successful entry into the heart of the City of New York by a railroad approaching the city along the easterly shore of the Hudson River."

and (*Id.* p. 530), Judge McLaughlin, writing for a unanimous court says :

> "All the property which the Spuyten Duyvil and Port Morris Railroad Company had at the time the assessment was made was included in its real estate, except its franchise, which the commissioners of taxes and assessments of the City of New York had no power to assess, the assessments upon that being made by other taxing officers under the authority of section 182 and section 184 of the Tax Law (Laws of 1896, chap. 908, as amd.)."

The franchises thus mentioned as taxed under Section 182 of the Tax Law were the indestructible, inheritable and alienable franchises which inhered in and pertained to the corporate property, improvement and use whereof constituted the corporate enterprise.

The distinction between these, and the franchises of corporate organization, existence and capacity, as regards pecuniary value thereof, is clearly presented by comparison of the foregoing with the obviously correct statement in the opinion of the learned Judge Earl, as Referee, in the Special Franchise Tax cases (p. 44 of pamphlet) as follows:

> "They mention the franchise to be a corporation. Such a franchise has very little cash value (*Detroit Citizens' Street Railway Company* vs. *Common Council*, 85 N. W. Rep., 96). The supply of these under general laws is unlimited. Any sufficient number of persons can organize any one of these corporations and thus potentially obtain all the corporate rights belonging under general laws to such a corporation—right to corporate existence, right to conduct the

corporate business, right to consolidate and to contract with other corporations, and all other rights, privileges and franchises which belong to the corporation as such under the laws. All these franchises and privileges are of little cash value, as they may be obtained *ad libitum* at small cost by the payment of the organization tax and the expense of drafting and filing the articles of incorporation. Hence they can play a very unimportant part in valuing these street franchises. They can have value only when the corporations have obtained rights in the streets for the exercise of their corporate powers and in valuing all the property of such corporations, such value is so unimportant that the law would not take much account of it. Of course, the State can arbitrarily tax the franchise to be a corporation, by special methods, but when an inquiry is set on foot as to the real value of such a franchise merely as such, it must be found to have but little more cash value beyond the cost of incorporation than the air we breathe."

These excerpts sufficiently exemplify that the legal rule and view, conform to the common sense rule and view, in according substantial value, not to the mere franchise of corporate being and capacity, to be had, once for all, for the full term of corporate life, upon payment of the prescribed per centum upon the authorized capital stock; but to the franchises which inhere in and pertain to the corporate enterprise, and which constitute vested rights, having the general attributes of property, including that of assignability, and having value according as they are fortuitously chosen and skillfully conducted; and that without regard to whether they are, or are not, employed and conducted by the corporation to which the State originally granted them.

(*a*) *Ownership or possession of the corporate franchise to be or to do, do not subject the owner or possessor to the tax.*

Notwithstanding the continued existence of the corpo-

ration, and continued existence and possession of the corporate capacity, powers, faculties and franchises with which it was at its creation endowed, if none of its capital is employed within this State during the tax year. Section 182 imposes no tax.

In *People ex rel. Singer Mfg. Co.* vs. *Wemple* (150 N. Y., 46), where the question presented was whether the amount of a foreign corporation's investment in real estate, under lease and not occupied by it, should, under Section 182 of the Tax Law, be deemed to constitute a part of its capital stock employed in this State, Bartlett, *J.*, writing for the Court, at page 49, says:

> "We are of opinion that the amount represented by the real estate was no portion of the capital stock employed within this State, even if the $900,000 was a part of the capital stock of the company; it was an independent investment, and was in no sense employed within this State in the transaction of the ordinary business of the relator. (*People ex rel. The Southern Cotton Oil Company* vs. *Wemple*, 131 N. Y., 64.) If at any time the whole or any portion of this real estate should be used by the relator in carrying on its business in this State, a different question would be presented, which need not now be considered."

In *People ex rel. Niagara River Hydraulic Co.* vs. *Roberts* (30 App. Div., 180), which the Court of Appeals "affirmed with costs on opinion below" (157 N. Y., 676), involving the question whether, as against a domestic corporation, its capital invested in substantially unproductive real estate, was, under Section 182 of the Tax Law, to be deemed "capital stock employed within this State," Landon, *J.*, writing for the Appellate Division, says:

> "The franchise tax is imposed upon domestic corporations because of their franchise. It is based upon their capital 'employed within this State' and graduated according to dividends earned. In respect to

foreign corporations, we do not grant them their franchises, but we permit them to do business here; and, as we should not accord them superior advantages over domestic corporations, we try to impose the same rate of taxation upon them, and thus we tax them upon their business, upon the same basis and scale. In *People ex rel. Singer Mfg. Co.* vs. *Wemple* (150 N. Y., 46), it was held as to a foreign corporation that the money, whether capital or surplus, which it invested in real estate here, not for the transaction of its ordinary business, but for rental, was not 'employed within the State,' within the meaning of the statute. If capital can be invested without being employed, the case before us seems to be a fair instance of it. Of course, the statute does not contemplate that a foreign corporation shall, in this respect, be more favored than a domestic one, and hence we must hold that the relator was not liable to the franchise tax."

The same principle was announced in *People ex rel. R.R. Co.* vs. *Morgan* (57 App. Div., 335), and by the Court of Appeals modified "as agreed upon by counsel, and as so modified affirmed, with costs, on opinion below" (168 N. Y., 672), wherein it is said:

> "This is not a tax upon property, but a tax upon a business done. It is an annual tax to be measured by an annual business done, or, in other words, by the appraised value of capital employed during an entire year.
>
> The capital must have been employed or else there is no tax. It must have been employed within the State. All the data going to fix the amount of the tax must be past transactions. Time of employment and amount employed are essential data to fix the amount of an annual tax upon a business with any degree of fairness. * * * It is not for the privilege to do business that the tax is imposed. The organization tax takes care of that, but it is the business actually done, and after it is done, and can be ascertained and measured, that this tax lights upon;

it is not for the privilege of doing business in the future. That also is provided for by the organization tax. It is for no privilege at all. The certificate of incorporation affords the privilege, and all the privilege, permitted or desired, to do business in this State."

The *Ft. George Realty Company* case was this:

An ancestor died leaving incumbered unimproved real estate, and the heirs organized a corporation, conveyed the property to it, taking shares of stock as payment. The corporation obtained a loan and applied the proceeds in discharge of the incumbrances, and against this corporation the Comptroller assessed a franchise tax which the Supreme Court, Appellate Division, in part affirmed and relator appealed.

The Court of Appeals, by Parker, *Ch. J.*, said:

"The question presented is whether the entire capital of relator is 'employed within this state' within the meaning of the provisions of Section 182 of the Tax Law. If it is, then relator must pay not only the organization tax—required when the corporation is organized—and the real estate tax—annually assessed against the property—but also a franchise tax.

"This property appears on the tax books of the City of New York as of the assessed value of $116,000. If Charles Francis Griffin was alive he would have to pay no other tax on the property, nor would his heirs at law if the title was still in them; but for convenience, as we have seen, they created a corporation to hold the title, the individual heirs at law taking stock for their proportionate shares. In organizing that corporation they had to pay an organization tax. The question now is whether they must in addition pay a franchise tax, and that depends upon the meaning to be given to the words 'employed within this state,' used in Section 182 of the Tax Law. That question we regard as having been settled so firmly by the decisions of this Court as to be no longer open for discussion" (p. 51).

After citing and quoting from the cases of *Singer Mfg. Co.* (150 N. Y., 46) and *Niagara River Hydraulic Co.* (157 N. Y., 676; 30 App. Div., 180) the conclusion announced is as follows:

> "It can be said in *this* case that if capital can be invested without being employed—and we have held in two cases that it can—this case is as good an illustration of it as can be found.
>
> "It follows that the authorities referred to require a reversal of so much of the order of the Appellate Division as is appealed from, with costs" (pp. 52-3).
>
> *People ex rel. Ft. George Realty Co.* vs. *Miller*, 179 N. Y., 49.

b. The tax is not imposed upon the franchise per se, but upon the use thereof.

Taxation imposed only in the event of use and exercise of corporate franchises, and measured by the stock capital employed, is not a tax on such franchise as is embraced in corporate existence or corporate capacity, but is solely a tax upon such franchises as are embraced in corporate activity.

Taxation imposed only in the event of use and exercise of corporate franchises, and measured by the stock capital employed, is taxation of and upon the franchises to do, and not of or upon franchises to be.

Taxation imposed upon and by reason of and only in the event of the use and exercise of corporate powers, and measured by the stock capital thus employed, is purely and simply a tax upon corporate activity, and in no sense a tax upon mere corporate being or capacity.

(c) Exercise of the franchise is the foundation for imposition of the tax, and the average amount of capital stock employed is the basis of computation of the tax.

The Court of Appeals, by Bartlett, *J.*, says:

> "The relator is a domestic corporation. * * * In the case of relator, where its principal business was conducted outside of this State, it became the duty of the comptroller to ascertain the amount of its capital stock employed within this State (Ch. 501, Laws of 1885, Sec. 11), for the purpose of computing the franchise tax."
>
> *People ex rel. U. V. Copper Co.* vs. *Roberts*, 156 N. Y., 586, 587, 591.

And again by Werner, *J.*, the following:

> "The relator is a domestic corporation owning and operating a system of cable and telegraph lines extending from this State into other states and countries" (p. 434).
>
> "It is apparent, of course, that this section applies to two classes of corporations. In the first class are those that declare and pay dividends of six per centum or more upon their capital stock; and in the second class are those that declare and pay dividends of less than six per centum upon their capital stock. The tax upon corporations in the first class is 'to be computed upon the basis of the amount of its capital stock employed within this state,' while the tax upon corporations in the second class is 'upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation.' It will be observed that in either case the tax can only be based upon the capital stock employed in this State, although the methods for ascertaining the amount thereof are different" (p. 438).
>
> *People ex rel. Com. Cable Co.* vs. *Morgan*, 178 N. Y., 433.

Supreme Court, Appellate Division, Third Department, by Merwin, *J.*:

> "It seems to me to be reasonably clear that a considerable portion of the capital of the relator was employed in this State, within the meaning of the

statute. That being so, it only remains to apply the rule for ascertaining the amount which has been quite definitely laid down by the Court of Appeals, that the capital of a foreign corporation employed within this State is represented by the actual value of its property within this State, whether in money or goods or other tangible things. * * *

"In arriving at the amount, the average amount of securities held and used in this State may, I think, be considered."

People ex rel. N. E. Loan Co. vs. *Roberts*, 25 App. Div., 16, 19, 20. (Affirmed on opinion below, 156 N. Y., 688.)

The same Court, by Kellogg, *J.*:

"Time of employment and amount employed are essential data to fix the amount of an actual tax upon a business with any degree of fairness, and I think the Legislature, in framing this Franchise Tax Law, had this in mind" (p. 337).

"This tax, by the wording of the statute, is to be annual. The relator must pay annually" (p. 338).

"The proper basis is the volume of business done spread out over twelve months, and this is easily determined by average in case the time is short of twelve months. That the proper method of reaching the amount of capital employed is by average is not only supported by sound common sense, but by authority" (p. 339).

People ex rel. Brooklyn R. T. Co. vs. *Morgan*, 57 App. Div., 335. (Affd. on opinion below, 168 N. Y., 672.)

In the case of *People ex rel. Mutual Trust Co.* vs. *Miller*, 177 N. Y., 51, relator began business six days prior to the end of the tax year. The Comptroller taxed it upon the same basis as if it had been engaged in business during the entire tax year. The Court of Appeals adjudged the Company taxable on its employed capital for only the pro-

portionate part of the tax year during which it carried on its business.

Vann, *J.*, writing for the Court, said:

> (p. 54) "The tax under consideration is not imposed upon property but upon a privilege. It is not imposed upon the privilege of becoming a corporation, for that would be an organization tax, payable but once for the entire period of corporate existence. It is imposed 'for the privilege of exercising' the corporate franchise, and is measured by the value of the investment made and used in carrying on the corporate business. It is an 'annual' tax, imposed 'annually,' as the statute expressly provides, for the privilege of exercising, not of possessing, a corporate franchise. This privilege was used by the relator for only six days during the fiscal year in question. It could not exercise its franchise for the entire year, because the state did not bring it into existence until the year had nearly expired. The consideration for the tax is the privilege of carrying on business, yet the relator, according to the requirement of the Comptroller, was compelled to pay for a privilege that it did not have and could not exercise during the greater part of the period for which the tax was laid. It used the privilege for only six days, but it is taxed for using it 365 days, during 359 of which it did no business and enjoyed no privilege. An annual tax is a tax reckoned by the year the same as annual rent or annual interest. An 'annual' tax imposed 'annually,' means a tax that is imposed once a year, computed by the year. If a trust company does not commence business until six days before the fiscal year ends, or if it ceases to do business six days after the year begins, the tax for doing business by the year requires apportionment. While the legislature did not so provide in express terms, it is a fair and reasonable implication from the words used that such was its intention. When by section 182 of the Tax Law it imposed an annual tax payable annually upon every corporation of a certain class, to be computed upon the basis of the amount of its capital stock 'em-

ployed within the state' during the year, it did not say expressly that the assessment should be determined by the *average* amount of capital so employed, but we held that this was what was necessarily meant (*People ex rel. Brooklyn Rapid Transit Co.* vs. *Morgan*, 57 App. Div., 335; 168 N. Y., 672). Adopting the opinion below, we said: 'This is not a tax upon property, but a tax upon the business done. It is an annual tax to be measured by an annual business done, or, in other words, by the appraised value of capital employed during an entire year. The capital must have been employed or else there is no tax. It must have been employed within the state. All the data going to fix the amount of the tax must be past transactions. Time of employment and amount employed are essential data to fix the amount of an annual tax upon a business with any degree of fairness * * *.'"

We may assume that the question is not free from doubt, for we cannot unite in judgment upon it; but serious doubt in a case of taxation should be resolved in favor of the taxpayer. (*Matter of Harbeck*, 161 N. Y., 211, 217; *Matter of Fayerweather*, 143 N. Y., 114, 119; *Powell* vs. *Tuttle*, 3 N. Y., 396, 401.) A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax. (Sutherland on Statutory Construction, 458; Black's Interpretation of Laws, 326; Cooley on Taxation, 200.)

We think the construction adopted is fair to the government and just to the citizen, for it gives the former full payment for the time the franchise was exercised, and takes from the latter nothing but what it impliedly agreed to pay when it accepted the franchise."

d. The use and exercise of the franchise, privilege or business of transportation thus taxed is that of carrying on commerce either intrastate, interstate or foreign.

The general unrestricted power to contract for the transportation of persons and property, embraced the power not only to make contracts at places foreign to this State, but also to make contracts for such transportation to and from points and *via* routes in foreign states and countries.

Bank of Augusta vs. Earle, 13 Pet., 519.

Mr. Chief Justice Taney:

(pp. 588-591.) "The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange; and consequently, gives it the power to purchase foreign bills as well as inland; in other words to purchase bills payable in another State. The power thus given, clothed the corporation with the right to make contracts out of the State, in so far as Georgia could confer it.

"Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed; whether, by the comity of nations and between these States, the corporations of one State are permitted to make contracts in another.

"It has, however, been supposed that the rules of comity between foreign nations do not apply to the States of this Union; that they extend to one another no other rights than those which are given by the Constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a State has adopted the comity of nations towards the other States, as a part of its jurisprudence; or that it acknowledges any rights but those which are secured by the Constitution of the United States. The court think otherwise. The intimate union of these States, as members of the same great political family; the deep and vital interests which

bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end."

It may perform such contracts either by the aid of other common carriers, or by lease or other control and operation of railroads, or other transportation facilities, situate without the State.

Railroad Law, Section 78. See Appendix, pp. 1-2.

Thus in *Day et al.* vs. *O. & L. C. R. R. Co.*, 107 N. Y., 129, complainants sought to restrain defendant company from using its net earnings for the purpose of carrying out the terms of a lease executed to it of a railroad in another State.

Danforth, *J.*, at page 140, said:

"It is next argued for the respondents that the arrangement expressed through these instruments, so far as the Ogdensburg & Lake Champlain Railroad Company is concerned, is beyond the capacity and power of that corporation. We have seen that the Vermont Railroad Company had corporate powers, and among those expressly given by its charter is a power to lease its road. It had, therefore, contracting capacity, and was a good party to deal with. The Ogdensburg & Lake Champlain Railroad, on its part, lacked no power expressly given by statute to similar corporations in this State, nor any which, as incident and necessary thereto, might enable it to carry on the objects of the incorporation. Among other statutes to which it might appeal was one 'authorizing railroad companies to contract with each other.' (Laws of 1839, chap. 218.) Under this act it might lawfully agree 'with any other railroad corporation' for the use of its road in any manner not 'inconsistent with

the provisions of the charter of the corporation whose railroad is to be used under such contract.' The contract in question is not affected by the limitation expressed in the act, and unless we are to imply into it another restriction and say that its operation must be confined to contracts with roads operating in and under the laws of this State, the lease must be held valid between the parties. We see no reason for such restriction, nor any principle of public law which requires it. We are not at liberty to create it. It would be legislation, not construction. A corporation given capacity to contract may exercise that capacity with any party in or outside the limits of the State, unless the law-making power of that other State forbids. (*Bank of Augusta vs. Earle*, 13 Peters, 519.) Our own statutes and the interpretation given to them by the courts are to that effect. (*Woodruff vs. Erie R. Co.*, 93 N. Y., 609; *In re N. Y. L. & W. R. R. Co.*, 99 *id.*, 12; *In re Peter Townsend*, 39 *id.*, 171; *In re Staten Island Rapid Tr. Co.*, 103 *id.*, 251.) In this case there is no such prohibition."

Indeed the comity of such other state or country, relied upon as the foundation of this authority for extra-territorial operations and service, is but the counterpart of the comity extended by this State to foreign corporations.

In *Matter of N. Y. L. & W. Ry. Co.*, 35 Hun, 220, Barber, *J.*, at page 227, said:

"It is now contended by the appellant that this act of the lessor corporation is illegal and in excess of its legitimate power, being in effect a surrender of its franchise and is contrary to public policy, and for that reason it should be held as a matter of law, that the petitioner is incapacitated from exercising the right of eminent domain conferred upon it by the legislature, and that the court should dismiss this application upon these grounds. Without the consent of the legislature the lease would be invalid as an unauthorized act on the part of the lessor cor-

poration. It has, however, been adjudged that power has been conferred on railroad corporations organized under the general laws of this State, to lease their roads and property and transfer the management and operation of the same to another railroad corporation. (Laws of 1839, chap. 218; *Woodruff vs. Erie Railway Company*, 93 N. Y., 616; *People vs A. and Vt. R. R. Co.*, 77 id., 234; *T. & B. R. R. Co. vs. B. H. T. and W. R. Co.*, 86 id., 107; *Foster vs. N. Y. C. & H. R. R. Co.*, 46 id., 644.) The circumstance that the term of the lease is during the corporate life of the lessor rather than for a shorter period, does not distinguish the case in principle from those just cited. The enabling act places no limitation as to the length of the term for which agreements of this character may be made. Neither is the lease invalid, for the reason that the lessee is a foreign corporation. There is no provision in the act prohibiting a lease by a railroad company organized under the laws of this State to a foreign corporation, on the contrary, the language of the statute is sufficiently broad to embrace them, and so far as the consent of this State is necessary to make them competent to accept a lease and assume the control and management of a railroad corporation organized under our laws, the language of the statute is very comprehensive in this particular, and permits any railroad corporation to contract with another railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract. The statute received this construction in the case of *Ogdensburg, etc., R. R. Co.* vs. *The Vermont, etc., R. R. Co.* (16 Abb. (N. S.), 249), and we concur in the views there expressed.

"It is a cherished policy of this State to favor and facilitate interstate commerce, and to invite the trade and traffic of other communities over our own lines of transportation, inducing merchants to seek a market in our towns and cities. To effect this purpose is one of the aims of the enabling act of 1839. The roads of the lessor and lessee, when run in connec-

tion, make a continuous line between two of the most widely separated and important cities and harbors in the State, the route also commands, in addition, a large local coal traffic, in which trade the general public are interested and benefitted. By the laws of comity a foreign corporation organized under the laws of another State can, within the jurisdiction of this State, exercise such corporate powers and franchises as are conferred upon it by the law of its creation, unless prohibited by the laws of this State. This privilege is conferred upon corporations as freely and fully as it is upon citizens of another State. Under this rule foreign corporations can do in this State, within the limit of their charter powers, precisely what a domestic corporation can lawfully do."

In *Matter of Townsend*, 39 N. Y., 171, Woodruff, *J.*, writing at page 175, said:

"There is nothing, then, in the Constitution, that requires that the right to construct a railroad or a canal, or other public work, shall be conferred, and only conferred, upon our own citizens, or upon a corporation organized for the purpose, or upon a corporation specially created by the legislature itself. That is subject to legislative discretion.

Nor is there any thing in the Constitution which prescribes what control over the subject, after the appropriation to the public use, the legislature shall retain to itself, in order to secure the contemplated public benefits. That is left to the wisdom of the legislature. There are general rules of law, which may be invoked to prevent abuses, even though the use be not guarded by any express reservation of visatorial powers.

In this view, there is no constitutional inhibition which restrains our legislature from exercising the right of eminent domain, and condemning land to the public use, and employing, as an instrument to carry the appropriation to the public use into effect, an individual or a copartnership of individuals residing in this or in another State, nor from, in like manner,

employing a corporation created by another State, for the like purpose.

The example cited to us, in which the New York and New Haven Railroad Company, incorporated by the State of Connecticut, are authorized to construct their railroad through Westchester county, is an illustration, the legality of which cannot, I think, be questioned. And instances might be multiplied in which railroads have been constructed in part through or in States other than the State of their incorporation.

The act of our legislature authorizing such corporations to do the act, not only recognizes their legal existence, but, *per se*, makes them, in contemplation of the laws of this State, corporations *pro hac vice;* and their acts, dohe in pursuance of the authority, will be, not by *comity* alone, but by *law*, corporate acts."

II.

It is necessary to the power of taxation upon the use and exercise of a franchise, privilege or business:

1. That such use and exercise thereof be carried on within the territorial domain of the taxing sovereignty; and,

2. That the franchise, privilege or business so there used and exercised be such as is within the organic prerogative of that sovereignty to tax the use of.

The State grants the privilege of exercising a public franchise, and, in consideration of that grant, exacts from those who accept and avail themselves thereof, payment, to be computed upon the basis of the amount of capital

employed in the exercise of that franchise within the State.

If and when, consequent upon petitioner's exercise of the charter capacity and power vested in it at its creation, of acquiring the right to operate upon and over, and to order, direct or permit its movable equipment to be operated upon and over, lines of railroad situate in other States, territories and dominions, in the use and exercise of franchises granted by them, respectively, and, in the economical and necessary course of such business, petitioner's movable equipment is used, as a whole and interchangeably, upon and over lines of railroad within and those without this State, the State imposes and exacts payment of its franchise tax computed upon the basis of the entire amount of petitioner's capital stock thus employed, such imposition and exaction constitutes either a regulation of and burden upon the use and exercise in said other States, territories and dominions, of the franchises granted by them, respectively, or imposes and exacts unequal and oppressive burdens in respect of petitioner's use and exercise in the State of New York of the corporate franchises granted and vested by that State.

The business transacted and the functions exercised in and by movements of relator's cars outside of this State are primarily those commanded and compelled by the Federal Government in its power to regulate inter-state commerce.

Incident to the cars of relator going beyond the limits of this State, and out of the custody of relator, the railroad companies which have obtained possession of them employ them upon their railroads, under authority of the franchises granted to them by the States in which they operate, and these cars are thus used both in traffic local to such roads, and in their interchange traffic with other railroad companies and other railroads; such traffic being as well in commerce local to respective States as also in

inter-state commerce; and relator is without power to either prevent or control such use of its cars, or to know the extent to which such use consists of commerce local to respective States, or of that which is inter-state. In this manner the proven average portion of relator's cars are employed by foreign corporations upon their railroads outside of this State, and in the exercise of franchises granted by the States wherein they are thus employed, to corporations created by and domiciled within those respective states.

If and so far as such exercise of franchises affords warrant for State taxation, computed upon the basis of the capital employed therein or otherwise, and as well regarding such exercise of franchises as is involved in the portion of car movements, which is outside of this State, in and by way of completion of transportion beginning in this State, or beginning of or carrying forward of acts of transportation completed in this State, as also regarding such exercise of franchises as have regard to transportation wholly outside of this State, the right and power of State taxation is exclusively that of the respective States wherein the said cars are thus employed.

The Delaware Railroad Tax, 18 Wall., 206, 232.

Erie Railroad Co. vs. *Pennsylvania*, 158 U. S., 431, 436.

a. Transportation between respective points one thereof within and the other without, or via routes in part within and in part without, a respective state, is interstate or foreign commerce.

The use of franchise here taxed is described by Judge Haight, as follows:

"The rolling stock of the relator is used in this State and outside of the State; that is, cars are loaded at some point in the State, as for instance in the City

of New York, and run over the relator's road to some other point, say, the City of Buffalo. They then are transferred on to other roads and are run to points outside of the State where they are unloaded and then reloaded and returned to this State. The entire mileage includes that travelled in this State as well as that out of the State; this, with the distance travelled outside of the State and the total value of the stock, furnishes the proportion upon which the computation is made.

The question is as to whether this stock is taxable under the statute. The relator is a domestic corporation. It owns the rolling stock. It is used upon its lines of railroad in this State. True, the cars are transferred on to other roads and are run outside of the State for the purpose of facilitating the transportation of persons and freight without change of cars or of breaking bulk; but the use of the cars outside of the State is but temporary, for they are returned as soon as reloaded and are again used in the transportation of persons and property within this State" (81 P. R., 49).

We respectfully submit that the words quoted constitute a clear, conspicuous and unequivocal statement of occupation and business of interstate commerce transportation pure and simple. The thing taxed is the use and exercise of that occupation, business and privilege. The basis of computation of the tax includes as well the average capital thus employed out of the State as that so employed within the State.

That portion of such use and exercise of privilege which is outside of this State is not taxable by this State because beyond its territorial jurisdiction. Such use and exercise of privilege, as well within as without this State, is that of interstate commerce, and for that reason is not subject unto the taxing power of the State.

State, etc. vs. *Knight*, 192 U. S., 21, 26.

b. Refusal of observance of the rule of average for taxation on commerce employment, is discrimination against such commerce.

Refusal of observance of such rule of per annum average of capital as the basis of assessment where the capital is employed in such commerce constitutes discrimination prejudicial to such commerce, and is thus violative of the commerce clause and the due faith and credit clause of the Federal constitution.

Judicial construction and decision recognize and observe the rule that corporations other than those engaged in interstate and foreign commerce, and employing a portion of their capital within this State and a portion thereof outside of this State, are to be taxed in respect of only so much of their capital as is employed within this State.

People ex rel. Loan Co. vs. *Roberts, supra.*

Imposition of tax, based upon the assumption that the exercise of privilege in other States, in and about transportation beginning or ending in this State, is in such wise incident to the business conducted in this State, that the average capital stock thus employed outside of the State is nevertheless employed within it, and to be included in the basis of the computation of the tax, is a discrimination against interstate commerce, violative of the commerce clause of the Federal Constitution, and a deprivation of the equal protection of the laws, and thus violative of the Fourteenth Amendment of the Federal Constitution.

That the car mileage, respectively, (*a*) upon the lines of this company and of other companies within this State, and (*b*) upon lines foreign to it and without the State, *prima facie* affords a just basis of apportionment of its average total of mail, express, passenger, baggage and freight cars continuously employed by other corporations without the State, and that the road mileage operated by

it, respectively, within and without the State affords a just basis of apportionment of its average total equipment continuously employed by it, respectively, within and without the State, is affirmed by this Court in numerous cases, of which we cite the following:

State Railroad Tax Cases, 92 U. S., 575.
Western Union Tel. Co. vs. *Massachusetts*, 125 U. S., 530.
Pullman's Palace Car Co. vs. *Pennsylvania*, 141 U. S., 18.
Maine vs. *Grand Trunk Ry. Co.*, 142 U. S., 217.
Charlotte, etc., R.R. Co. vs. *Gibbs*, 142 U. S., 386.
Columbus Southern Ry. Co. vs. *Wright*, 151 U. S., 470.
Pittsburgh, etc., Ry. Co. vs. *Backus*, 154 U. S., 421.
Cleveland, etc., Ry. Co. vs. *Backus*, 154 U. S., 439.
Adams Ex. Co. vs. *Ohio*, 164 U. S., 194; s. c., 166 U. S., 185.
Am. Refrig. Transit Co. vs. *Hall*, 174 U. S., 70.
Union Refrigerator Transit Co. vs. *Kentucky*, 199 U. S., 194.

The measure of use within the State, of the franchise granted by it, is the same in the case of one who employs a capital of one million wholly within the State, as in that of one who employs a capital of two millions, of which a permanently and definitely identified and specified one-half, or an average of one-half, is employed within the State, and the other one-half employed without the State.

Recognition of the rule of average as a guide in and limitation upon imposition of this tax upon capital stock employed otherwise than in interstate and foreign com-

merce, and refusal of recognition and observance of such rule of average in the imposition of taxation upon capital stock employed in interstate and foreign commerce, is a discrimination against such commerce.

The amount of capital employed in the State is not increased or diminished by the impossibility or impracticability of identification of specific cars which, from time to time, are or are not embraced within the amount there employed.

A tax computed upon an amount in excess of the average amount of such capital employed within the State at any one time within the tax year, is afforded no support by the fact, either presumed or established, that by constant process of movement and interchange thereof each and every individual car is present in and used within the State during some portion of the tax year.

Where, by reason of constant movement and interchange of locomotives, cars, or other movable equipment of a railroad corporation between its road mileage within and that without this State, and between its road and the roads of other corporations situate wholly without this State, a defined proportionate share of the total, though composed of constantly changing specific items thereof, is continuously situate and employed outside this State, the value of such proportionate share thereof constitutes no part of "the amount of its capital stock employed within the State." Relator's freight car equipment, consisting of approximately sixty thousand cars, severally constantly moving within, and from, and without, and into this State, in such manner as to render impracticable the making or furnishing of data regarding specific cars, or numbers thereof, which may or may not have been employed within the State at some time during the tax year, but of which relator is able to and does have and furnish data showing the average amount thereof employed within this State during said year, affords no reason for imposing the

tax in respect thereof upon any other basis than that of the average amount thereof employed within this State during said tax year.

A tax computed and imposed upon the basis of the aggregate value of a total equipment, an average of five-ninths whereof is continuously used and employed by others than the owner wholly outside this State, and an average of one-eighth of the remainder whereof is continuously used and employed by the owner upon its leased road mileage wholly outside this State, is not a tax "computed upon the basis of the amount of its capital stock employed within this State."

The authorized basis of computation has no reference to the question whether "the amount of its capital stock employed within this State" consists in and is represented by, and its franchise exercised by means of, the same items of property throughout the tax year, or by wholly different items of property each successive day in the tax year; or to the extent or degree to which its employed capital may partake of either of these characteristics.

"The amount of capital stock employed within this State" during the tax year, and from day to day during that year, is in no wise augmented or swollen by the fact that the defined proportionate share thus employed is composed of constantly changing specific articles or items, part and parcel of a larger aggregate number of like articles or items of property, the balance whereof are not concurrently there employed.

III.

Taxation of or upon the exercise of the privilege of commerce conducted in another State, or computed upon the capital there so employed, whether such commerce be interstate, foreign, or intra-state, transcends the jurisdiction of the taxing State, and thus takes property without due process of law, and denies full faith and credit to the public acts of such other State.

The power of taxation cannot embrace either person, property or business having their *situs* outside the taxing State. Jurisdiction of the person carrying on business or exercisng privilege in the State of his domicile and in other States, cannot draw to the domiciliary State the power of taxation of business done or privilege exercised in other States. The territory of the sovereignty in which the business is done, or the privilege exercised, constitutes the *situs* of such transaction of business or exercise of privilege; such *situs* is matter of fact and not matter of fiction or imputation. Power and jurisdiction to tax the use and exercise of that portion of privilege exercised or business transacted within the domiciliary State does not carry with it the power or jurisdiction of taxation of the privilege exercised or business transacted outside of the territorial sovereignty of that State. The power and jurisdiction of *ad valorem* taxation of tangible property, having its *situs* in fact or imputed, within the domiciliary State of the owner of such property, does not draw to or carry with it the power and jurisdiction of taxation upon the business transacted or privilege exercised outside of said domiciliary State, even though in the carrying on of

such business and the exercise of such privilege the aforementioned tangible property is used and employed outside of such State. Transportation service consisting of continuous transportation either from a point in one State to a point in an adjoining State, or from a point in one State through one or more other States to a point in another State, involve in each case, in each State thus in whole or in part traversed, the exercise of privilege granted or accorded by such individual State. The privilege exercised in each State is as primary as that exercised in any other. The exercise of the privilege in one State is in no sense by virtue of or under authority of the exercise of privilege in the other State. The power and jurisdiction of taxation as to each is confined to and does not extend beyond the line of its territorial sovereignty.

a. It is requisite to due process of law that the tribunal have jurisdiction of the subject matter of such process.

The taxing authorities had jurisdiction of the person of the corporation taxed in *Phila. Steamship Co.* vs. *Pennsylvania*, 122 U. S., 326; *Louisville, &c., Ferry Co.* vs. *Kentucky*, 188 U. S., 385; *Del., L. & W. R. Co.* vs. *Pennsylvania*, 198 U. S., 341; *Union Refrigerator Transit Co.* vs. *Kentucky*, 199 U. S., 194. They did not, however, have jurisdiction of the subject matter of the tax, and, therefore, the imposition of the tax was adjudged unauthorized and void.

Absence of congressional regulation of, or restraint or burden upon, interstate commerce, constitutes no warrant for State regulation, restraint or burden thereof. Upon like principle, absence of State regulation of, or restraint or burden upon, commerce local to such State, constitutes no warrant for another State to exercise extra-territorial

jurisdiction, whereby to impose such regulation, restraint or burden.

The mere fact that a State grants and continues corporate life and capacity to a body corporate of its creation, constitutes no warrant for taxation by that State of such corporation's tangible property having its *situs* beyond the territorial jurisdiction of that State, or of the corporation's capital stock invested in that property (*Del., L. & W. R. Co.* vs. *Pennsylvania*, 198 U. S., 341); nor for taxation of or upon franchises owned by such corporation which were granted by authority foreign to, and have their *situs* outside of, the territorial jurisdiction of such State (*Louisville & J. Ferry Co.* vs. *Kentucky*, 188 U.S., 385); nor of franchises owned by such corporation, but which were granted to it by the United States (*California* vs. *Pac. R. Co.*, 127 U. S., 1); nor of cars owned in excess of the average number thereof employed in the taxing State (*Union Refrigerator Transit Co.* vs. *Kentucky*, 199 U. S., 194).

The reason why the State of Pennsylvania could not tax the D., L. & W. Co.'s coal having its *situs* in the State of New York and Illinois, or its capital stock invested therein, and why the State of Kentucky could not tax the L. & J. Ferry Co.'s Indiana franchise; or the Refrigerator Co.'s cars, in excess of the average number thereof employed in that State; was not in either case that the property was taxed in other respective States, but, that it was in each case beyond the taxing power of that State.

b. The State cannot, by conferment of corporate charter powers to transact business, (1), outside of its territorial domain, or, (2), of character outside the sphere of its governance, draw to itself the power of taxation upon such exercise of the charter powers conferred by it.

In case where a state creates a corporation with corporate capacity and power to own, lease, maintain and

operate railroads, and by means thereof transport persons and property both within and without the territorial jurisdiction of such state, and upon such creation thereof imposes and exacts, once for all, the tax for and upon such corporate existence, capacity and power for the full term of corporate life, and where, in the exercise of such corporate capacity and power, such corporation employs its capital in the use and exercise of the franchises granted by other respective States, Territories and Dominions, to therein transport persons and property constituting and pertaining to their local, interstate and foreign commerce, the state which created such corporation has no jurisdiction to impose and exact from it a franchise tax computed upon the basis of the capital of such corporation in manner aforesaid employed in such other respective States, Territories and Dominions.

> "The State power of taxation extends in general to all property, real or personal, having an actual *situs* within the state, irrespective of the residence of the owner. The state may not only tax property within its limits, but the business and occupation of its citizens, and the franchises of domestic corporations; and when it permits foreign corporations to carry on business in the state, it may ordinarily subject the privilege to such taxation as it may deem expedient. In short, the power of state taxation is coextensive with the subjects of taxation, and the state may define the subjects, provided only that the property, privilege, or right upon which the tax is imposed is within the jurisdiction."
>
> *People ex rel. P. R.R. Co.* vs. *Wemple*, 138 N. Y., 1, 9.

> "The jurisdiction to tax foreign corporations under Chap. 542 of the laws of 1880, as amended by Chap. 501 of the laws of 1885, and the subsequent amendments, depends upon the existence of two concurring conditions, namely, that the corporation sought to be

taxed shall be 'doing business' in this state, and, second, that its capital or some portion thereof, shall have been 'employed within this state.'"

People ex rel. Chi. Junc. Co., etc., vs. *Roberts*, 154 N. Y., 1, 2.

c. The situs of exercise of the franchise pertaining to transportation upon and over any railroad, is the situs of the railroad, and of the franchise relating thereto.

As regards the question of taxability the *situs* of the franchise is the *situs* of the exercise and use of the franchise and of the business which consists of the use and exercise of the franchise.

The use and exercise of the franchise, occupation, privilege or business cannot have a *situs* either *de facto* or imputed elsewhere than in the jurisdiction in which the business is conducted.

De facto or imputed *situs* of the physical property employed in such service does not draw with it the *situs* of the use or exercise of occupation, privilege or business in which the property is employed.

The corporate franchises used and exercised within the State, by domestic surface steam railroad corporations, are those which the State has granted and vested in and by charters authorizing the building, maintenance and operation of railroads within the State.

As it is the peculiar and sole province of the United States to prescribe what burdens the use and exercise of the occupation, privilege or business of interstate and foreign commerce shall be subject unto, so also, for like reason and upon like principle, it is the peculiar and sole province of each State to prescribe what burdens the use and exercise of the occupation, privilege and business of its local commerce shall be subject unto.

The same principle governs in the case of the one as in that of the other, that in so far as there is absence of leg-

islation imposing burden such silence is tantamount to a declaration that the use and exercise of the occupation, privilege or business of commerce local to the State shall be free of any and all burden other than such, if any, as the State has imposed.

d. Car movements, or the thereby exercise of franchise cannot have an imputed situs.

In *People ex rel. Manhattan R. Co.* vs. *Barker* (152 N. Y., 417), Judge Vann, writing, at page 439, says:

> "The lease of a line of railroad necessarily includes the use of the franchise of the company owning it, for without it the lessee would have no right to operate the road."

If and so far as these car movements outside of this State carry on a commerce local to the State in which the car movements occur, such commerce is that of that State, carried on under and in pursuance of its authority, subject to its control and under its protection; and the corporate right and privilege exercised therein are those granted or extended by that State, and are subject unto only such regulation and burden as that State imposes.

When the rolling stock of this relator is used and employed outside of New York State, either by relator or by other corporations, it is so employed in the exercise of franchises granted by other states and foreign countries, respectively, which franchises have their fixed *situs* where the corporeal property is, the use of which for railroad purposes constitutes exercise of the franchise; and the tax in respect thereof herein complained of has no other foundation than the subjection to the burden thereof of the use and exercise of franchise granted by such other state or country, or of the commerce carried on by the means and use of the said franchises.

There is no rule or principle of law by which these cars, or the capital of relator invested in or represented by

them, can, during their absence from this State, be regarded as employed within this State, or as exercising any franchise or performing any function the right whereof is granted by this State, or as in any wise having the protection of this State.

The franchise itself cannot be deemed to attend the owner to and at his domicil in another jurisdiction, and the same is true of the use and exercise of the franchise, and of the business consisting of the use and exercise of the franchise.

The principle upon which tangible property more or less constantly in movement to and from and within and without the State in which its owner resides may be deemed to have the *situs* of the owner's domicil, for the purposes of its taxation as property, has no application to a privilege tax upon the employment of the property, in such wise as to impute its employment to the State of the owner's domicil, when it is in fact employed elsewhere, nor to impute its employment to the use and exercise of franchises granted by that State, when in fact its employment is in the use and exercise of franchises granted by other States, Territories and Dominions.

The fact, in so far as it be a fact, that the transportation service performed with and by petitioner's cars, when outgoing begins, and when incoming ends in this State, and in the use and exercise therein of franchises granted by this State, does not, as matter of law or fact, serve to localize or give *situs* in this State to such entire transportation service, or to the entire employment of such cars, or to the use and exercise of all of the franchises under authority whereof the entire transportation service is performed.

Attempt to impute the use and exercise of the occupation, privilege or business thus carried on in other States to the franchise conferred by this State upon this relator, instead of to the franchise of and pertaining to the rail-

roads in other States, upon and over which the business is conducted, does not at all serve or tend to bring such use and exercise of occupation, privilege or business within the power of the taxing jurisdiction of this State.

The occupation, privilege or business used and exercised in such other States is nevertheless that of inter-state and foreign commerce, and of commerce local to such other respective State wherein the car operations are conducted and carried on, and in either case beyond the taxing jurisdiction of this State.

Phila. Steamship Co. vs. *Pennsylvania*, 122 U. S., 326.

No rule of law or principle of law does or can impute to the domicil of the owning corporation these car movements, or the therein or thereby exercise of franchise or privilege.

e. Taxation of exercise of franchise to do can only be imposed by the sovereignty in whose domain the work is done.

The case of *Adams Express Co.* vs. *Ohio*, 165 U. S., 194, involved the validity of *ad valorem* taxation. The express company contended that the only subject-matter of assessment was its physical property situate within the State, and that the assessment and the statute under which it was made were invalid in that the valuation, as by the statute directed, was based upon assumption that its entire property was employed in its business and that its property employed in and having a *situs* for taxation in Ohio consisted of such proportion of its entire property constituting a business unit as the mileage over which it operated in Ohio bore to the entire mileage of its operations.

Mr. Chief Justice Fuller in an opinion sustaining the

validity of the law and assessment, at page 222, mentions "the contract for transportation facilities" as a part of the unit subject to such taxation. He quotes from the Supreme Court of Ohio, among other, the following:

(p. 224.) "'If by reason of the good will of the concern, or the skill, experience and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it cannot properly be said not to be its true value in money within the meaning of the Constitution, because good will and other elements indirectly entered into its value. The market value of property is what it will bring when sold as such property is ordinarily sold in the community where it is situated; and the fact that it is its market value cannot be questioned because attributed somewhat to good will, franchise, skillful management of the property or any other legitimate agency,'"

and commenting thereon the Chief Justice, at page 226, said:

"Nor, in this view, is the assessment on property not within the jurisdiction of the taxing authorities of the State, and for that reason amounting to a taking of property without due process of law. The property taxed has its actual *situs* in the State and is, therefore, subject to the jurisdiction, and the distribution among the several counties is a matter of regulation by the state legislature."

(p. 229.) "Considering, as we do, that the unit rule may be applied to express companies without disregarding any other Federal restriction, we think it necessarily follows that this law is not open to the objection of denying the equal protection of the laws."

That is to say that where the corporation exercises its franchise to do, that franchise has a *situs* for taxation in

the domain of the sovereignty where that franchise is exercised.

Concession of the soundness of that proposition is inconsistent with the theory that another state by the mere fact that it is the state of the domicil of the corporation, can draw to itself the power to impose a privilege tax upon such foreign exercise of the franchise.

The franchise exercised was in large part that of using the railroad situate in Ohio for its transportation business. Such use is a *pro tanto* exercise of the corporate charter powers conferred by the state of Ohio upon railroads chartered by and situate within that state.

In the same case on motion for re-hearing (166 U. S., 185) Mr. Justice Brewer, at pages 224, 225, said:

> "The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done. The Southern Pacific Railway Company is a corporation chartered by the State of Kentucky, yet within the limits of that State it is said to have no tangible property and no office for the transaction of business. The vast amount of tangible property which by lease or otherwise it holds and operates, and all the franchises to do which it exercises, exist and are exercised in the States and Territories on the Pacific Slope. Do not these intangible properties—these franchises to do—exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every State in which that tangible property is found?"

The commerce thus carried on by car movements in other states consists of either that local to such state or that of an interstate or foreign character.

The privilege of carrying it on is in either case not

derived from this state, and taxation upon the exercise of such privilege transcends the jurisdiction of the state.

McCulloch vs. *Maryland*, 4 Wheat., 316, 429.
State Tax on Foreign held Bonds, 15 Wall., 300.
Morgan vs. *Parham*, 16 Wall., 471, 478.
Delaware Railroad Tax, 18 Wall., 206, 229.
Gloucester Ferry Co. vs. *Pennsylvania*, 114 U. S., 196, 206, 209.
Phila. Stshp. Co. vs. *Pennsylvania*, 122 U. S., 326, 344.
Erie Railroad vs. *Pennsylvania*, 153 U. S., 628, 646.
Leloup vs. *Mobile*, 127 U. S., 640, 648.
Postal Tel. Cable Co. vs. *Adams*, 155 U. S., 688, 695, 696, 700.

These cases serve to illustrate the obvious difference between the instance of the state imposing a tax upon the value of, or a privilege tax for the use of a franchise granted by it, for the building and operation of a railroad within its domain, and that of imposing a tax upon and for the use and exercise of the occupation, privilege or business of interstate or foreign transportation, and that the state may not do this last merely because that state created and is the domicile of the corporation performing the transportation service.

The franchise thus exercised is that to maintain and operate the respective railroad within the territory of the sovereign which granted the franchise. Neither fact nor fiction ever did or can serve to constitute such franchise a commodity or property the *situs* of which might accompany the owner in another sovereignty in which such owner of the franchise might be domiciled. What is true of the franchise in this regard is true of the lease or license

under authority of which relator's cars are employed in the use of the franchise.

Louis. & Jeff. Ferry Co. vs. *Kentucky*, 188 U. S., 385.

It follows that the privilege tax prescribed by this legislation cannot be in lieu of or the basis of exemption from *ad valorem* taxation of and upon these franchises as property; and that it cannot be supported as a privilege tax upon the exercise of either the franchises granted by other states of and for the railroads over which relator's rolling stock operates, or the franchise granted by the State of New York to relator of and for its corporate organization, existence and capacity.

(*f*) *Local commerce is subject to local tax by the State wherein it is conducted.*

State of N. Y., ex rel., Penn. R.R. Co. vs. *Knight*, 192 U. S., 21 (affirming 171 N. Y., 354), involved a business tax imposed upon the relator in respect of its cab service to and from its ferry terminals in New York.

Mr. Justice Brewer, writing for the Court, said:

> (p. 26.) "Undoubtedly, a single act of carriage or transportation wholly within a state may be part of a continuous interstate carriage or transportation. Goods shipped from Albany to Philadelphia may be carried by the New York Central Railroad only within the limits of New York, and yet that service is an interstate carriage. By reason thereof the Nation regulates that carriage, including the part performed by the New York company. But it does not follow therefrom that the New York company is wholly relieved from State regulation and State taxation, for a part of its work is carriage and transportation begun and ended within the State. So the Pennsylvania company, which is engaged largely in interstate transportation, is amenable to State regulation and State taxation as to any of its service, which

is wholly performed within the State and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the State and that between the States a like separation may be recognized between the control of the State and that of the Nation (*Osborne* vs. *Florida*, 164 U. S., 650; *Pullman Co.* vs. *Adams*, 189 U. S., 420.)

As we have seen, the cab service is rendered wholly within the State and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a State, it is presumably subject to State control. The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction."

(p. 28.) "We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation, and therefore the judgment of the Supreme Court of the State of New York was correct, and it is *affirmed*."

g. Determination as to what tax the exercise of the occupation, privilege or business of intra-state commerce may be subject unto, involves, (1), giving full faith and credit to the public acts of the State whose local commerce it is, and (2), acceptance thereof as thus accredited, as the sole basis of such determination.

In so far as any State wherein the occupation, privilege or business of intra-state or local commerce is used and exercised by operations of relator's cars therein, has imposed burden or regulation thereon, such burden or regulation is within the exclusive power of such State.

In so far as such State has refrained from burden upon or regulation of such commerce, its inaction is equivalent to a declaration that it shall be free.

Taxation of the use and exercise of the franchise employed in such other State, based upon stock capital invested in the average number of cars operated in such other State, is a burden upon and regulation of the intrastate or local commerce of the State wherein the said cars are operated.

Attempt of the State of New York to impose burden upon the use and exercise of the occupation, privilege or business of such commerce of another State, denies full faith and credit to the public acts of such State.

Petitioner having alleged and proved that of its entire capital only a designated average portion is employed in the State of New York or in the use and exercise of franchises granted by that State, and that the remaining average portion thereof is continuously and at all times employed in other respective States, Territories and Dominions, in the use and exercise of franchises granted by them respectively, the imposition by the State of New York under existing legislation, of a tax, computable upon the basis of the entire capital of relator employed in the use and exercise of all of the said franchises, constitutes an unauthorized and unwarranted burden upon the use and exercise in other States, Territories and Dominions of the franchises granted by them, respectively.

Taxation by the State of New York of and upon such use and exercise of any corporate franchise as is embraced or involved in the operation of relator's cars upon and over railroads chartered by and situate in other States, is a burden upon and regulation of the franchise and commerce of such railroads, and of the State in which such railroads are situate, and as such contravenes the Federal Constitution in that it denies full faith and credit to the public acts of such other States, and constitutes the taking of property by means of process operating beyond the territorial jurisdiction of this State, and hence without due process of law.

The effect of the holding of the State Courts, that this statute authorizes taxation to be computed upon the basis of the capital employed in and by the average number of relator's cars operated outside of this State, is to subject the Statue to the rule announced by this Court in *Wabash, &c., Ry. Co.,* vs. *Illinois* (118 U. S., 557), in which Justice Miller, writing at page 565, says:

> "It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the State. The Supreme Court of Illinois, having in this case given an interpretation which makes it apply to what we understand to be commerce among the States, although the contract was made within the State of Illinois, and a part of its performance was within the same State, we are bound, in this court, to accept that construction."

h. The effect of the statute (Tax Law, Sec. 182), as adjudged by the New York courts, is to tax the corporate use and exercise in other states, of the occupation, privilege, and business, of the local commerce of those states.

In *Louisville, &c., Ferry Co.* vs. *Kentucky,* 188 U. S., 385, Mr Justice Harlan, writing for the court, at pages 397-398, says:

> "We recognize the difficulty which sometimes exists in particular cases in determining the *situs* of personal property for purposes of taxation, and the above cases have been referred to because they have gone into judgment and recognize the general rule that the power of the state to tax is limited to subjects within its jurisdiction or over which it can exercise dominion. No difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal *situs*

in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; as much so as if the State taxed the real estate owned by that company in Indiana.

This view is not met by the suggestion that Kentucky can make it a condition of the exercise of corporate powers under its authority that the tax upon the franchise granted by it shall be measured by the value of all its property, wherever situated, of whatever nature, or from whatever source derived. It is a sufficient answer to this suggestion to say that no such condition was prescribed in the charter of the ferry company when it was granted and accepted. Nor does the taxing statute in question make it a condition of the ferry company's continuing to exercise its corporate powers that it shall pay a tax for its property having a *situs* in another State. There is no suggestion in the company's charter that the State would ever, in any form, tax its property having a *situs* in another State. We express no opinion as to the validity of such a condition if it had been inserted in the company's charter, or if it were now, in terms, prescribed by any statute. We decide nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its *situs*, for purposes of taxation, in Indiana."

Mr. Justice Peckham, writing for the court in *Delaware, L. & W. R. Co.* vs. *Pennsylvania*, 198 U. S., 341, at page 352, says:

"The only question for this Court to determine is whether, in refusing to deduct the value of the coal

mined in Pennsylvania, and which at the time of the appraisement was situated outside the jurisdiction of the State, from the value of the capital stock, the state court denied any right of the plaintiff in error, which was protected by the Federal Constitution."

(p. 358.) "It is true that in general an appraisement of or an assessment of a tax upon value is a decision upon a question of fact, and a difference of opinion as to the value between the assessing officer and the court is immaterial, and the decision of the former is final. But where the appraisement is arrived at by including therein tangible property, which is beyond the jurisdiction of the State, and which, therefore, the assessing officers had no jurisdiction to appraise (and none could be given them by the statute), such an appraisement or assessment is absolutely illegal, as made without jurisdiction.

The next question is whether there is a right to relief in a case like this, founded upon the provisions of the Federal Constitution. We think there is. The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment."

The thing taxed is the use and exercise of the franchise employed in car movements, in states and dominions other than the State of New York. In so far as dependent upon the authority, sanction or protection of any state, it was other than that of the State of New York. The franchise used and the use thereof were equally as foreign to the State of New York as were the non-taxable cars foreign to Kentucky in the *Union Refrigerator case*, in which Mr. Justice Brown, writing for the Court, said:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the asumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property,

or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this Court to be beyond the power of the Legislature and a taking of property without due process of law."

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a Legislature has assumed to impose tax upon land within the jurisdiction of another State, much less where such action has been defended by any Court. It is said by this Court in the Foreign-held Bond case (15 Wall., 300-319), that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised.

"The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a

foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in Louisville, etc., Ferry Co. *vs.* Kentucky (188 U. S., 385-396): 'While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the Legislature, that power is limited by principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing Government.' "

The use, exercise and employment of whatsoever franchise was used, exercised or employed in these car movements in states and dominions other than New York were as foreign to its governance and protection as were the railroads upon and over which those movements were carried on. Such thereof as were conducted by and upon the roads of foreign corporations, the State of New York did not, either for those or any other purposes, have any jurisdiction of the corporations which carried on the car movements.

Conclusion.

The ground upon which the majority opinion of the Court of Appeals, in the case at bar, rests its departure from the rule administered in the case of *People* vs. *Campbell*, *supra*, will not stand the test of analysis.

The theory of the supposed distinction assumes that in the earlier cases the values of certain cars were excluded from the basis of computation of the tax because, during the entire tax year, specific individual cars of the value named, were continuously and permanently absent from and employed outside of this State; whereas, in the case at bar, the exclusion claimed has regard to an average

proportion of an aggregate number and value of cars employed in car movements, some wholly within, others partly within and partly without, and still others wholly without, this State.

If the things here taxed were the tangible property, it might be pertinent to note the fact that "the relator is a domestic corporation," and "it owns the rolling stock." This, for the purpose of distinguishing such thereof as was only temporarily absent from this State, and thus had no *situs* apart from that of the domicil of its owner, and hence taxable there, from other thereof which was permanently absent from and employed outside of the State, and thus had a foreign *situs*, and for that reason not taxable at the domicil of its owner.

The thing here taxed, however, being such use and exercise of whatsoever franchise is used and exercised in car movements outside the State, that use and exercise of franchise cannot have any locality or *situs* other than that of the road, or portion of road, upon and over which the respective car movement occurs.

If and in so far as the car movement is in the State of New York the franchise employed in and by such car movement, is exercised under the grant or permission, governance and protection of this State. Such movement in Pennsylvania, or other respective state, uses the requisite franchise under the grant or permission, governance and protection of the State in which the car movement is had.

Moreover, as each car movement is identified with and constitutes *pro tanto* the carrying on of commerce, it is perforce identified with and embraced in either the commerce of and local to that State or dominion in which the car movement occurs, or commerce interstate or foreign, and the exercise of franchise, in the first case, is beyond the taxing power of a sovereignty foreign to that in whose territorial domain the car movement is had; and in the

second case, is beyond the taxing power of a sovereignty whose jurisdiction does not embrace the governance of interstate and foreign commerce.

Requirement that, as the price of exercise of its franchise within this State, relator must submit to taxation computed upon the amount of its capital stock represented by its equipment, as well that employed outside of as that employed in commerce local to or within this State, denies to it the equal protection of the law.

Requirement that, as the price of exercise of its franchise within this State, relator must submit to taxation computed upon the amount of its capital stock represented by its equipment, as well that employed in exercise of whatsoever franchises are exercised in car movements in other States and foreign dominions, in the local commerce of such respective States or dominions, or in interstate or foreign commerce, as also that employed within the State of New York, transcends the jurisdiction of the State, in that it imposes burden and restriction upon interstate and foreign commerce, impairs the obligations of contracts under which such franchises exist and are used, denies full faith and credit to the public acts of other States, and takes property without due process of law, in that the process by which it is taken, is by such requirement made operative and effective extra the territorial and subject-matter sovereignty of the taxing State.

Respectfully submitted,

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APPENDIX.

RAILROAD LAW.

"SEC. 78. LEASE OF ROAD. Any railroad corporation or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract. Such contract may provide for the exchange or guaranty of the stock and bonds of either of such corporations by the other, and shall be executed by the contracting corporations under the corporate seal of each corporation, and if such contract shall be a lease of any such road and for a longer period than one year, such contract shall not be binding or valid unless approved by the votes of stockholders owning at least two-thirds of the stock of each corporation which is represented and voted upon in person or by proxy at a meeting, called separately for that purpose upon a notice stating the time, place and object of the meeting, served at least thirty days previously upon each stockholder personally, or mailed to him at his post-office address and also published at least once a week, for four weeks successively, in some newspaper printed in the city, town or county where such corporation has its principal office, and there shall be endorsed upon the contract the certificate of the secretaries of the respective corporations under the seals thereof, to the effect that the same has been approved by such votes of the stockholders, and the contract shall be executed in duplicate and filed in the offices where the certificates of incorporation of the contracting corporations are filed. The road of a corporation can not be used under any such

contract in a manner inconsistent with the provisions of law applicable to its use by the corporation owning the same at the time of the execution of the contract. Such contracts shall be executed by the corporations, parties thereto, and proved and acknowledged in such manner as to entitle the same to be recorded in the office of the clerk or register of each county through or into which the road so to be used shall run. Nothing in this section shall apply to any lease in existence prior to May first, eighteen hundred and ninety-one."

FRANCHISE TAX LAW OF 1880.

Sections one, three, six, seven and eight of Chapter 542 of the Laws of 1880 were as follows:

"SECTION 1. Hereafter it shall be the duty of the president or treasurer of every association, corporation or joint-stock company liable to be taxed on its capital stock, as provided in section three of this act, to make report in writing to the comptroller, annually, on or before the fifteenth day of November, stating specifically the amount of capital paid in, the date, amount and rate per centum of each and every dividend declared by their respective corporations, joint-stock companies or associations, during the year ending with the first day of said month. In all cases where any such corporation, joint-stock company or association shall fail to make or declare any dividend upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or dividends made or declared upon either its common or preferred stock, during the year ending as aforesaid, shall amount to less than six per centum upon the par value of the said common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of November in each year, in which no dividend has

been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock amounted to less than six per centum upon the par value of said common or preferred stock, estimate and appraise the capital stock of such company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at its actual value in cash, not less, however, than the average price which said stock sold for during said year; and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the comptroller a certificate thereof, accompanied by a copy of their said oath or affirmation, by them signed, and attested by the magistrate or other person qualified to administer the same, provided, that if the comptroller is not satisfied with the valuation so made and returned, he is hereby authorized and empowered to make a valuation thereof and to settle an account upon the valuation so made by him for the taxes, penalties and interest due the estate thereon; and any association, corporation or joint-stock company dissatisfied with the account so settled may within ten days appeal therefrom to the board of equalization, which board, on such appeal, shall affirm or correct the account so settled by the comptroller, and the decision of said board shall be final; but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest as due on said account, as settled by the comptroller, be deposited with the State treasurer."

"SECTION 3. Every corporation, joint stock company or association whatever, now or hereafter incorporated under any law of this State, or now or hereafter incorporated by any other State or country and doing business in this State, except savings banks, and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing corporations carrying on manufacture within this State, shall be subject to and pay a tax into the treasury of the State annually, to be computed as follows: If the dividend or dividends, made or de-

cleared by such corporation, joint-stock company or association, during any year ending with the first Monday in November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividend so made or declared, or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of a valuation of the said capital stock made in accordance with the provisions of the first section of this act; and in case any such corporation, joint stock company or association shall have more than one kind of capital stock, as, for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one percentum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto, tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of the first section of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per per centum."

"SECTION 6. In addition to the taxes above provided for, every corporation formed for railroad, canal, steamboat, ferry, express navigation or transportation purposes, and every elevated railway company, and every other corporation, joint-stock company or association now or hereafter incorporated by

or under any law of this State, or now or hereafter incorporated by any other State or country and doing business in this State, and owning, operating or leasing to or from another corporation, joint-stock company or association, any railroad, canal, steamboat, ferry, express, navigation, pipe line or transportation route or line, or elevated railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freights or passengers, and every telegraph company or telephone company incorporated under the laws of this or any other State, and doing business in this State, and every express company, palace car or sleeping car company, incorporated or unincorportated, doing business in this State, shall pay to the State treasurer for the use of the State a tax of five-tenths of one per centum upon the gross earnings in this State of said corporation or company, for tolls, transporation, telegraph or express business transacted in this State, and in arriving at the gross earnings of any express, palace car or sleeping car company, or freight line, there shall be first deducted the expenses paid to any common carrier for transportation upon such business within this State. Nothing in this section contained shall be held to apply to any street surface railroad company."

"SECTION 7. The tax imposed under section six of this act shall be paid semi-annually, upon the first days of February and August of each year, the first payment to be made on the first day of August, A.D. eighteen hundred and eighty, and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer, or other proper officer of the corporations, joint-stock companies or associations therein referred to, to transmit to the comptroller a statement, under oath or affirmation, of the amount of the gross receipts of the said associations, corporations or joint-stock companies derived from all sources during the preceding six months, and if any such corporation, joint-stock company or association shall neglect or refuse, for a period of thirty days after such tax become due, to make returns or to pay the

same, the amount thereof, with the addition of ten per centum thereto, shall be collected for the use of the State as other taxes are recoverable by law, from such corporation, joint-stock company or association."

"SECTION 8. The lands and real estate of the various corporations, joint-stock companies and associations mentioned in this act shall continue to be assessed and taxed where situated, but the capital stock and personal property of said corporations, joint-stock companies and associations shall hereafter be exempt from assessment or taxation, except as in this act prescribed, and no tax on gross receipts, except as in this statute authorized, shall be imposed or charged against any street horse-railroad company."

The above act was amended by Chapter 361 of the Laws of 1881, and thereby Sections one and three were made to read as follows:

"SECTION 1. Hereafter it shall be the duty of the president or treasurer of every association, corporation or joint-stock company liable to be taxed on its corporate franchise or business, as provided in section three of this act, to make report in writing to the comptroller annually, on or before the fifteenth day of November, stating specifically the amount of capital paid in, the date, amount and rate per centum of each and every dividend declared by their respective corporations, joint-stock companies or associations, during the year ending with the first day of said month. In all cases where any such corporation, joint-stock company or association shall fail to make or declare any dividend upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or dividends made or declared upon either its common or preferred stock during the year ending as aforesaid, shall amount to less than six per centum upon the par value of the said common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of

November, in each year in which no dividend has been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock amounted to less than six per centum upon the par value of said common or preferred stock, estimate and appraise the capital stock of such company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at its actual value in cash, not less, however, than the average price which said stock sold for during said year; and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the comptroller a certificate thereof, accompanied by a copy of their said oath or affirmation, by them signed, and attested, by the magistrate or other person qualified to administer the same; provided, that if the comptroller is not satisfied with the valuation so made and returned, he is hereby authorized and empowered to make a valuation thereof and to settle an account upon the valuation so made by him for the taxes, penalties and interest due the state thereon; and any association, corporation or joint-stock company dissatisfied with the account so settled, may within ten days appeal therefrom to a board consisting of the secretary of state, attorney-general and state treasurer, which board, on such appeal, shall affirm or correct the account so settled by the comptroller, and the decision of said board shall be final; but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest as due on said account, as settled by the comptroller, be deposited with the state treasurer."

"SECTION 3. Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this state, or now or hereafter incorporated or organized by or under the laws of any other state or country and doing business in this state, except savings banks, and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing

corporations carrying on manufacture within this state, which exception shall not be taken to include gas companies or trust companies, shall be subject to and pay a tax, as a tax upon its corporate franchise or business, into the treasury of the state annually, to be computed as follows: If the dividend or dividends made or declared by such corporation, joint-stock company or association, during any year ending with the first day of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends so made or declared; or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one half mills upon each dollar of a valuation of the said capital stock made in accordance with the provisions of the first section of this act; and in case any such corporation, joint-stock company or association shall have more than one kind of capital stock, as, for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto, tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum."

"SECTION 6. In addition to the taxes above provided for, every corporation formed for railroad, canal, steamboat, ferry, express, navigation or transportation purposes, and every elevated railway company, and every other corporation, joint-stock company or association now or hereafter incorporated or organized by or under any law of this state, or now or hereafter incorporated or organized by or under the laws of any other state or country and doing business in this state, and owning, operating or leasing to or from another corporation, joint-stock company or association, any railroad, canal, steamboat, ferry, express, navigation, pipe line or transportation route or line, or elevated railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freights or passengers, and every telegraph company or telephone company incorporated under the laws of this or any other state, and doing business in this state, and every express company or association, palace car or sleeping car company or association incorporated or unincorporated, doing business in this state, shall pay to the state treasurer for the use of the state, as a tax upon its corporate franchise or business in this state, a tax, at the rate of five-tenths of one per centum upon the gross earnings in this state of said corporation or company or association, for tolls, transportation, telegraph, telephone or express business transacted in this state."

"SECTION 7. The tax imposed under section six of this act shall, after the first day of August, eighteen hundred and eighty-one, be paid annually on the first day of August of each year. It shall be the duty of the president, secretary or other proper officer of the corporations, joint-stock companies or associations referred to in section six of this act to transmit to the comptroller, on the first day of August in each year, a statement under oath or affirmation of the amount of the gross earnings of the said associations, corporations or joint-stock companies derived from all sources during the year ending with the preceding thirtieth day of June, together with the

amount of tax imposed thereon by section six. And it shall also be the duty of the president, secretary or other proper officer of the corporations, joint-stock companies or associations referred to in section six of this act, to transmit to the comptroller on the first day of August, eighteen hundred and eighty-one, a statement under oath or affirmation of the amount of the gross earnings of the said associations, corporations or joint-stock companies derived from all sources during the six months ending with the thirtieth day of June, eighteen hundred and eighty-one, together with the tax imposed thereon by section six of this act. And if any such corporation, joint-stock company or association shall neglect or refuse for a period of thirty days after any tax imposed by sections six or seven of this act becomes due, to make returns or to pay the same, the amount thereof, with the addition of ten per centum thereto, shall be collected for the use of the state as other taxes are recoverable by law from such corporation, joint-stock company or association."

"SECTION 8. The corporations, joint-stock companies and associations mentioned in this act as taxable shall hereafter be exempt from assessment and taxation for state purposes, except upon their real estate and as herein provided; but they shall in all other respects be liable to assessment and taxation as heretofore."

Said section three was amended by Chapter 359 of the Laws of 1885 so as to read as follows:

"SECTION 3. Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this state, or now or hereafter incorporated or organized by or under the laws of any other state or country, and doing business in this state, except savings banks and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing or mining corporations carrying on manufacture or mining ores within this state, which exception shall not be taken to include gas companies

or trust companies, shall be subject to and pay a tax as a tax upon its corporate franchise or business, into the treasury of the state annually, to be computed as follows: If the dividend or dividends made or declared by such corporation, joint-stock company or association during any year ending with the first day of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends so made or declared, or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of the valuation of the said capital stock, made in accordance with the provisions of the first section of this act; and in case any such corporation, joint stock company or association shall have more than one kind of capital stock, as, for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum."

By Chapter 501 of the Laws of 1885, the Act was further "amended by adding thereto nine additional sections, to

be called sections eleven," *et seq.*, of which the said sections eleven and fourteen are as follows:

"SECTION 11. The amount of capital stock which shall be the basis for tax under the provisions of section three of this act, in the case of every corporation, joint-stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this state. In making to the comptroller the report in writing or certificate of estimate and appraisal of the capital stock of such corporation, joint-stock company or association provided for by the first section of this act, it shall be the duty of the president or treasurer thereof, as the case may be, to state specifically the amount of capital stock employed within this state, of such corporation, joint-stock company or association. Whenever the comptroller is dissatisfied with such report or certificate of estimate and appraisal, as the case may be, of any corporation, joint-stock company or association whose capital is only partially employed within this state, he is authorized and empowered to ascertain, fix and determine the amount of capital employed within this state, and to settle an account for the taxes and penalties due the state thereon."

"SECTION 14. The comptroller is hereby authorized and directed, upon application to him made by any corporation, joint-stock company or association, to make, settle and adjust all accounts against such corporation, joint stock company or association, for all taxes and penalties arising under the third section of this act since the twelfth day of May, A. D. eighteen hundred and eighty-two, by taking as a basis for taxation the capital employed within the state by such corporation, joint-stock company or association. Provided, however, that such corporation, joint-stock company or association shall not be entitled to the benefit of a settlement upon such basis unless it shall have secured such adjustment and paid into the treasury the full amount of the taxes so settled, before the first day of August, eighteen hundred and eighty-five; nor shall this section apply to the case of any tax for which suit shall have been heretofore brought by the

attorney-general, in which suit the trial has been commenced, or in which judgment shall have been entered heretofore for the people for the amount of said tax. Any corporation, joint-stock company or association whose capital has heretofore been only partially employed within this state, and which is now liable for taxes arising under the third section of this act since the twelfth day of May, A. D. eighteen hundred and eighty-two, and which are still due and unpaid, may, at any time prior to the first day of August, eighteen hundred and eighty-five, pay to the state treasurer, for the use of the state, in full discharge of the same, such sum of money as shall be fixed by the comptroller as the tax due for the said period by the said corporation, joint-stock company or association, upon the basis of the capital employed within the state. Provided, that this section shall not apply to the case of any tax for which suit may have heretofore been brought by the attorney-general, and for which judgment shall have been entered therein, or if in such suit trial has been commenced."

TAX LAW.

"SEC. 2. DEFINITIONS. 1. 'Tax district' as used in this chapter, means a political subdivision of the state having a board of assessors authorized to assess property therein for state and county taxes.

2. 'County treasurer' includes any officer performing the duties devolving upon such officer under whatever name.

3. The terms 'land,' 'real estate,' and 'real property,' as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all

supports and inclosures for electrical conductors and other appurtenances upon, above and under ground; all surface, under ground or elevated railroads, including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through streets, highways, or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes; all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the state. A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax.

4. The term special franchise shall not be deemed to include the crossing of a street, highway or public place where such crossing is not at the intersection of another street or highway, unless such crossing shall be at other than right angles for a distance of not less than two hundred and fifty feet, in which case the whole of such crossing shall be deemed a special franchise. This subdivision shall not apply to any elevated railroad.

5. The terms 'personal estate,' and 'personal property,' as used in this chapter, include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage; debts and obligations for the payment of money due or owing to persons residing within this state, however secured or wherever such securities shall be held; debts due by inhabitants of this state to persons not residing within the United States for the purchase of any real estate; public stocks, stocks in moneyed corporations, and such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate.

"SEC. 3. PROPERTY LIABLE TO TAXATION. All real property within this State, and all personal property situated or owned within this State, is taxable unless exempt from taxation by law."

"SEC. 11. PLACE OF TAXATION OF PROPERTY OF CORPORATIONS. The real estate of all incorporated companies liable to taxation, shall be assessed in the tax district in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company liable to taxation on its capital shall be assessed in the tax district where the principal office or place for transacting the financial concerns of the company shall be, or if such company have no principal office, or place for transacting its financial concerns, then in the

tax district where the operations of such company shall be carried on. In the case of toll bridges, the company owning such bridge shall be assessed in the tax district in which the tolls are collected; and where the tolls of any bridge, turnpike, or canal company are collected in several tax districts, the company shall be assessed in the tax district in which the treasurer or other officer authorized to pay the last preceding dividend resides.

"SEC. 12. TAXATION OF CORPORATE STOCK. The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll or shall be exempt by law, together with its surplus profits or reserve funds exceeding ten per centum of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value."

"SEC. 21. PREPARATION OF ASSESSMENT ROLL. They shall prepare an assessment roll containing six separate columns and shall, according to the best information in their power, set down:

1. In the first column the names of all the taxable persons in the tax district.

2. In the second column the quantity of real property taxable to each person with a statement thereof in such form as the commissioners of taxes shall prescribe.

3. In the third column the full value of such real property.

4. In thefourth column the full value of all the taxable personal property owned by each person respectively after deducting the just debts owing by him.

5. In the fifth column the value of taxable rents reserved and chargeable upon lands within the tax district, estimated at a principal sum, the interest of which,

at the legal rate per annum, shall produce a sum equal to such annual rents and if payable in any other thing except money the value of the rents in money to be ascertained by them and the value of each rent assessed separately, and if the name of the person entitled to receive the rent assessed cannot be ascertained by the assessors, it shall be assessed againt the tenant in possession of the real property upon which the rents are chargeable.

6. In the sixth column the value of the special franchise as fixed by the state board of tax commissioners.

7. Such assessment roll shall contain two additional columns in one of which shall be inserted the amount of the tax levied against each person named therein, and in the other the date of the payment of such tax."

"SEC. 27. REPORTS OF CORPORATIONS. The president or other proper officer of every moneyed or stock corporation deriving an income or profit from its capital or otherwise shall, on or before June fifteenth, deliver to one of the assessors of the tax district in which the company is liable to be taxed and, if such tax district is in a county embracing a portion of the forest preserve, to the comptroller of the state, a written statement specifying:

1. The real property, if any, owned by such company, the tax district in which the same is situated and, unless a railroad corporation, the sums actually paid therefor.

2. The capital stock actually paid in and secured to be paid in excepting therefrom the sums paid for real property and the amount of such capital stock held by the state and by any incorporated literary or charitable institution, and

3. The tax district in which the principal office of the company is situated or in case it has no principal office, the tax district in which its operations are carried on.

Such statement shall be verified by the officer making the same to the effect that it is in all respects just and

true. If such statement is not made within twenty days after the fifteenth day of June, or is insufficient, evasive or defective, the assessors may compel the corporation to make a proper statement by mandamus."

"SEC. 31. CORPORATIONS, HOW ASSESSED. The assessors shall assess corporations liable to taxation in their respective tax districts upon their assessment rolls in the following manner:

1. In the first column the name of each corporation, and under its name the amount of its capital stock paid in and secured to be paid in; the amount paid by it for real property then owned by it wherever situated; the amount of all surplus profits or reserve funds exceeding ten per centum of their capital, after deducting therefrom the amount of said real property and the amount of its stock, if any, belonging to the state and to incorporated literary and charitable institutions.

2. In the second column the quantity of real property except special franchises owned by such corporation and situated within their tax district.

3. In the third column the actual value of such real property, except special franchises.

4. In the fourth column the amount of the capital stock paid in and secured to be paid in, and of all of such surplus profits or reserve funds as aforesaid, after deducting the sums paid out for all the real estate of the company, wherever the same may be situated, and then belonging to it, and the amount of stock, if any, belonging to the people of the state and to incorporated literary and charitable institutions.

5. In the fifth column the value of any special franchise owned by it as fixed by the state board of tax commissioners."

"SEC. 42. ASSESSMENT OF SPECIAL FRANCHISES. The state board of tax commissioners shall annually fix and

determine the valuation of each special franchise subject to assessment in each city, town, or tax district. After the time fixed for hearing complaints the tax commissioners shall finally determine the valuation of the special franchises, and shall file with the clerk of the city or town in which said special franchise is assessed a written statement duly certified by the secretary of the board of the valuation of each special franchise assessed therein as finally fixed and determined by said board; such statement of valuation shall be filed with the town clerk of the respective towns within thirty days next preceding the first day of July in each year; and with the clerks of cities of the state within thirty days before the date set opposite the name of each city in the following schedule. In the city of New York such statement shall be filed with the department of taxes and assessments.

SCHEDULE OF DATES FOR FILING OF ASSESSMENTS OF SPECIAL FRANCHISES (omitted).

Each city or town clerk shall, within five days after the receipt by him of the statement of assessment of a special franchise by the state board, deliver a copy of such statement certified by him to the assessors or other officers charged with the duty of making local assessments in each tax district in said city or town and to the assessors of villages and commissioners of highways within their respective towns and villages. The valuations of every special franchise as so fixed by the state board shall be entered by the assessors or other officers in the proper column of the assessment roll before the final revision and certification of such roll by them, and become part thereof with the same force and effect as if such assessment had been originally made by such assessor or other officer. If a special franchise assessed in a town is wholly within a village, the valuation fixed by the state board for the town shall also be the valuation for the village. If a part only of such special franchise is

in a village, or is in a village situated in more than one tax district, it shall be the duty of the village assessors to ascertain and determine what portion of the valuation of such franchise, as the same has been fixed by the state board, shall be placed upon the tax roll for village purposes. The valuation apportioned to the town shall be the assessed valuation for highway purposes, and in case part of such special franchise shall be assessed in a village and part thereof in a town outside a village, the commissioners of highways of the town and village shall meet on the third Tuesday in August in each year and apportion the valuation of such special franchises between such town outside the village and such village for highway purposes. In case of disagreement between them the decision of the supervisor of the town shall be final. The town assessors shall make an apportionment among school districts at the time and in the manner required by section thirty-nine of this chapter. The valuation so fixed by the state board shall be the assessed valuation on which all taxes based on such special franchise in the city, town or village for state, municipal, school or highway purposes shall be levied during the next ensuing year. It shall not be necessary for the state board of tax commissioners to give notice to any person, co-partnership, association or corporation of the valuation of a special franchise located in any village for village purposes except in a case where such valuation is required to be made for such village purposes by the state board of tax commissioners. The assessors or other taxing officer, or other local officer in any city, town or village, or any state or county officer, shall on demand furnish to the state board of tax commissioners any information required by such board for the purpose of determining the value of a special franchise."

"SEC. 55. LEVY OF TAX BY SUPERVISORS. The board of supervisors of each county shall, at its annual meet-

ing, levy the taxes for the county, including the state tax, upon the valuations as equalized by it and estimate and set down in a separate column in the assessment-roll of each tax district therein, opposite to the sums set down as the valuation of real and personal property or property of incorporated companies or of the taxable rents reserved, the sum to be paid as a tax thereon, including the state tax, as fixed by the comptroller. Such assessment-roll shall, when the warrant is annexed thereto, become the tax roll of the tax district, and a copy thereof shall be delivered to the proper supervisor, who shall deliver it to the clerk of the proper city or town to be kept by him for its use."

"SEC. 180. ORGANIZATION TAX. Every stock corporation incorporated under any law of this state shall pay to the state treasurer a tax of one-twentieth of one per centum upon the amount of capital stock which the corporation is authorized to have, and a like tax upon any subsequent increase. Provided, that in no case shall such tax be less than one dollar. Such tax shall be due and payable upon the incorporation of such corporation or upon the increase of its capital stock. Except in the case of a railroad corporation neither the secretary of state nor county clerk shall file any certificate of incorporation or article of association, or give any certificate to any such corporation or association until he is furnished a receipt for such tax from the state treasurer, and no stock corporation shall have or exercise any corporate franchise or powers, or carry on business in this state until such tax shall have been paid. In case of the consolidation of existing corporations into a corporation, such new corporation shall be required to pay the tax hereinbefore provided for only upon the amount of its capital stock in excess of the aggregate amount of capital stock of said corporations. This section shall not apply to state and national banks or to building, mutual loan, accumulating

fund and co-operative associations. A railroad corporation need not pay such tax at the time of filing its certificate of incorporation, but shall pay the same before the railroad commissioners shall grant a certificate, as required by the railroad law, authorizing the construction of the road as proposed in its articles of association, and such certificate shall not be granted by the board of railroad commissioners until it is furnished with a receipt for such tax from the state treasurer."

"SEC. 184. ADDITIONAL FRANCHISE TAX ON TRANSPORTATION AND TRANSMISSION CORPORATIONS AND ASSOCIATIONS. Every corporation and joint-stock association formed for steam surface railroad, canal steamboat, ferry express, navigation, pipe-line, transfer, baggage express, telegraph, telephone, palace car or sleeping car purposes, and all other transportation corporations not liable to taxes under sections one hundred and eighty-five or one hundred and eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within the state, which shall include its gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character. All settlements for such taxes heretofore based by the comptroller upon gross earnings excluding earnings from interstate business, have been ratified and confirmed, except that the accounts for taxation under section six of chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, for the years eighteen hundred and ninety-two and eighteen hundred and ninety-three, shall be settled and adjusted by the comptroller by excluding the earnings of an interstate character as provided by this section."

"SEC. 189. REPORTS OF CORPORATIONS. Corporations liable to pay a tax under this article shall report as follows:

1. CORPORATIONS PAYING FRANCHISE TAX. Every corporation, association or joint-stock company liable to pay a tax under section one hundred and eighty-two of this chapter shall, on or before November fifteenth in each year, make a written report to the comptroller of its condition at the close of its business on October thirty-first preceding, stating the amount of its authorized capital stock, the amount of stock paid in, the date and rate per centum of each dividend declared by it during the year ending with such day, the entire amount of the capital of such corporation, and the capital employed by it in this state during such year.

2. TRANSPORTATION AND TRANSMISSION CORPORATIONS. Every transportation or transmission corporation, joint-stock company or association liable to pay an additional tax under section one hundred and eighty-four of this chapter, shall also, on or before August first in each year, make a written report to the comptroller of its condition at the close of its business on June thirtieth preceding, stating the amount of its gross earnings from all sources and the amount of its gross earnings from all transportation or transmission business originating and terminating within this state.

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"SEC. 190. VALUE OF STOCK TO BE APPRAISED. In case no dividend has been declared, by a corporation, association or joint-stock company liable to pay a tax under section one hundred and eighty-two of this chapter, the treasurer or secretary of the company shall, under oath, between the first and fifteenth day of November in each year, estimate and appraise the capital stock of such company upon which no dividend has been declared, or upon which the dividend amounted to less than six per centum

at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and shall forward the same to the comptroller with the report provided for in the last section. If the comptroller is not satisfied with the valuation so made and returned he is authorized and empowered to make a valuation thereof, and settle an account upon the valuation so made by him, and the taxes, penalties and interest to be paid the state."

"SEC. 195. REVISION AND READJUSTMENT OF ACCOUNTS BY COMPTROLLER. The comptroller may, at any time within one year from the time any such account shall have been audited and stated, and notice thereof sent to the person, partnership, company, association or corporation against whom it is stated, revise and readjust such account upon application therefor by the party against whom the account is stated or by the attorney-general, and if it shall be made to appear upon any such application by evidence submitted to him or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that payment has been legally made or exacted of any such account, he shall resettle the same according to law and the facts, and charge or credit, as the case may require, the difference, if any, resulting from such revision or resettlement upon the accounts for taxes of or against any such person, partnership, company, association or corporation. The comptroller shall forthwith send written notice of its determination upon such application to the applicant, which notice may be sent by mail to his post-office address.

"SEC. 196. REVIEW OF DETERMINATION OF COMPTROLLER BY CERTIORARI. The determination of the comptroller upon any application made to him by any person, partnership, company, association or corporation for a revision and resettlement of any account, as pre-

scribed in this article, may be reviewed both upon the law and the facts, upon certiorari by the supreme court at the instance of any person, partnership, company, association or corporation affected thereby, and in the name and on behalf of the people of the state. For the purpose of such review the comptroller shall return, on such certiorari, the accounts and all the evidence before him on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon. If the original or resettled accounts shall be found erroneous or illegal, either in point of law or of fact, by the supreme court, upon any such review, the accounts reviewed shall then be corrected and restated, and from any determination of the supreme court upon any such review, an appeal to the court of appeals may be taken by either party."

"SEC. 202. EXEMPTIONS FROM OTHER STATE TAXATION. The personal property of every corporation, company, association or partnership, taxable under this article, other than for an organization tax, shall be exempt from assessment and taxation upon its personal property for state purposes, and the personal property of every corporation taxable under section one hundred and eighty-seven-a of this article, other than for an organization tax, and as provided in chapter thirty-seven of the general laws, shall be exempt from assessment and taxation for all other purposes, if all taxes due and payable under this article have been paid thereby. The personal property of a private or individual banker, actually employed in his business as such banker, shall be exempt from taxation for state purposes, if such private or individual banker shall have paid all taxes due and payable under this article. Such corporation and private or individual banker shall in no other respect be relieved from assessment and taxation by reason of the provisions of this article. The owner and holder of stock in an incorpo-

rated trust company liable to taxation under the provisions of this act shall not be taxed as an individual for such stock."

LAWS OF 1899.

CHAP. 208.

"SECTION 1. There shall be imposed for the fiscal year commencing on the first day of October, eighteen hundred and ninety-nine, a state tax of seven one-hundredths of a mill on each dollar of the valuation of the real and personal property in this state subject to taxation, which tax shall be assessed, levied and collected by the annual assessment and collection of taxes for that year in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of the state, to be held by the state treasurer for appropriation to the purposes hereinafter designated."

LAWS OF 1899.

CHAP. 571.

"SECTION 1. There shall be imposed for the fiscal year beginning on the first day of October, eighteen hundred and ninety-nine, on each dollar of real and personal property of this state subject to taxation, taxes for the purposes hereinafter mentioned, which taxes shall be assessed levied and collected by the annual assessment and collection of taxes of that year in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of this state, to be held by the treasurer, to be applied to the purposes specified; that is to say; For the general fund, and for the payment of those claims and demands which shall constitute a lawful charge upon that fund during the fiscal year commencing October first, eighteen hundred and ninety-nine, one and twenty-

six one-hundredths of a mill; for the canal fund, for the payment of appropriations to pay the expenses of superintendence, maintenance and ordinary repairs during said fiscal year, eighteen one-hundredths of a mill; for the canal fund, for the payment of appropriations for those objects and work on the canals of this state which are not included in the appropriation for the superintendence, maintenance and ordinary repairs thereof during said fiscal year, four one-hundredths of a mill; for the canal fund, for the annual contribution to the canal debt sinking fund, pursuant to chapter seventy-nine of the laws of eighteen hundred and ninety-five, thirteen one-hundredths of a mill; for the free school fund, for the payment of those claims and demands which shall constitute a lawful charge upon that fund during said fiscal year, eighty one one-hundredths of a mill."

LAWS OF 1900.

CHAP. 421.

"SECTION 1. There shall be imposed, for the fiscal year beginning on the first day of October, nineteen hundred, on each dollar of real and personal property of this State subject to taxation, taxes for the purposes hereinafter mentioned, which taxes shall be assessed, levied and collected by the annual assessment and collection of taxes of that year in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of this state, to be held by the treasurer, to be applied to the purposes specified; that is to say: For the general fund, and for the payment of those claims and demands which shall constitute a lawful charge upon that fund during the fiscal year commencing October first, nineteen hundred, sixty-eight one-hundredths of a mill; for the canal fund, for the payment of appropriations to pay the ex-

penses of superintendence, maintenance and ordinary repairs during said fiscal year, and for deficiency in appropriation for the fiscal year ending September thirtieth, nineteen hundred, twenty-one one-hundredths of a mill; for the canal fund, for the payment of appropriations for those objects and work on the canals of this state which are not included in the appropriations for the superintendence, maintenance and ordinary repairs thereof during said fiscal year, eighteen one-hundredths of a mill; for the canal fund, for the annual contribution to the canal debt sinking fund, pursuant to chapter seventy-nine of the laws of eighteen hundred and ninety-five, thirteen one-hundredths of a mill; for the free school fund, for the payment of those claims and demands which shall constitute a lawful charge upon that fund during said fiscal year, seventy-six one-hundredths of a mill."

LAWS OF 1901.

CHAP. 643.

"SECTION 1. There shall be imposed, for the fiscal year beginning on the first day of October, nineteen hundred and one, on each dollar of real and personal property of this state subject to taxation, taxes for the purposes hereinafter mentioned, which taxes shall be assessed, levied and collected by the annual assessment and collection of taxes of that year in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of this state, to be held by the treasurer, to be applied to the purposes specified; that is to say: For the canal fund, for the payment of appropriations to pay the expenses of superintendence, maintenance and ordinary repairs during the fiscal year commencing October first, nineteen hundred and one, seventeen one-hundredths of a mill; for the canal fund, for

the payment of appropriations for those objects and work on the canals of this state which are not included in the appropriations for the superintendence, maintenance and ordinary repairs during the said fiscal year, fifteen one-hundredths of a mill; for the canal fund, for the annual contribution to the canal debt sinking fund, pursuant to chapter seventy-nine of the laws of eighteen hundred and ninety-five, thirteen one-hundredths of a mill; for the free school fund, for the payment of those claims and demands which shall constitute a lawful charge upon that fund during said fiscal year, seventy-five one-hundredths of a mill."

LAWS OF 1902.

CHAP. 615.

"SECTION 1. There shall be imposed, for the fiscal year beginning on the first day of October, nineteen hundred and two, on each dollar of real and personal property of this State subject to taxation, taxes for the purpose hereinafter mentioned, which taxes shall be assessed, levied and collected by the annual assessment and collection of taxes of that year in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of this State, to be held by the treasurer, to be applied to the purpose specified; that is to say: For the canal fund, for the annual contribution to the canal debt sinking fund, pursuant to chapter seventy-nine of the laws of eighteen hundred and ninety five, thirteen one-hundredths of a mill."

LAWS OF 1903.

CHAP. 641.

"SECTION 1. There shall be imposed, for the fiscal year beginning on the first day of October, nineteen hundred

and three, on each dollar of real and personal property of this state subject to taxation, taxes for the purpose hereinafter mentioned, which taxes shall be assessed, levied and collected by the annual assessment and collection of taxes of that year in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of this state, to be held by the treasurer, to be applied to the purpose specified, that is to say : For the canal fund, for the annual contribution to the canal debt sinking fund, pursuant to chapter seventy-nine of the laws of eighteen hundred and ninety-five, thirteen one-hundredths of a mill."